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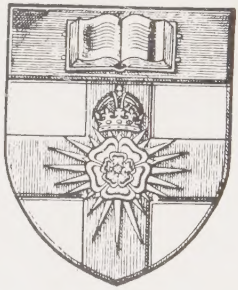

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

MAY 21, 1928, TO DECEMBER 16, 1929.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BIBL.
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INDEX OF APPELLANTS' NAMES.

	PAGE
Anderson, M. C.	178
Armstrong, F. K.	115
Atkinson, J. W.	111
Ayles, A. A.	72
Bennewith, J. C.	157
Berry, W.	47
Blackman, J.	132
Boltolph, G. E.	37
Brooks, S.	112
Brown, P.	185
Burns, T.	57
Canham, J. W.	174
Charavanmuttu, E. V.	184
Clark, J. R. V.	81
Clue, F.	68
Coulthurst, G.	58
Crabb, J. L.	155
Crockett, R. G.	164
Crompton, W. J.	105
Cushing, C.	174
Dale, J.	141
Dale, W. G.	114
De Antiquis, L.	76
Dealer, H.	165
Donovan, G. T.	20
Draper, A. A.	147
Dunbar, W. F.	19
Dunne, J.	176
Emmett, G. E.	42
Fitt, J. W.	41
Fleming, R.	149
Frampton, H. E.	17
Gallagher, T.	172
Gans, B.	1
Gaskell, A.	83
Gore, G. F.	175
Goring, R. H. L.	77
Greenwood, W.	186
Greville, F.	108
Hall, W. R.	48
Harding, L. E.	166
Harry, T. H.	21
Hemingway, T.	172
Hobbs, R. L.	14
Hochglick, M.	161
Inman, M.	159
Johnson, G.	66
Jones, W. (breaking, etc.)	27
Jones, W. (uttering)	59

	PAGE
KEECH, H. J.	125
Kelly, T.	151
Kenny, F.	78
Kitching, G. C. ... (1) 116; (2)	144
Knight, J.	72
Knowles, J. H.	76
LAWS, R. J.	45
Leach, W. R.	44
Liddle, S.	3
Lines, W. M.	175
MACDONALD, D.	154
MacDonald, M.	26, 33
MacWilliam, P.	31
Manders, G.	114
Marck, H. W.	65
Marshall, E.	39
Mayo, S.	141
Meyrick, K. E.	94
Miao, C. Y.	56
Millichamp, R.	106
Montgomery, W.	140
Morgan, D. G.	43
Morris, W. P.	108
Mullinger, B. E.	155
NEWMAN, G.	141
O.K. SOCIAL AND WHIST CLUB, LTD.	119
O'Brien, J.	136
PARKINGTON, T.	110
Pattinson, R.	139
Pearce, H.	79
Pearcy, H. W.	160
Powell, G.	67
REES, I.	35
Ribuffi, L. A.	94
Roberts, C.	69
SEARLE, P.	141
Seely, R. G.	18
Smith, J. H.	138
Stringer, C.	155
TAVENER, G.	63
Taylor, P. L.	20
Thompson, C. A.	38
Tobitt, G. V.	63
Towers, W. L.	74
Tuttle, W. E.	85
UPTON, W	156
WALLACE, A. (habitual criminal)	70
Wallace, A. (larceny)	143
Weaver, J.	20
Westfall, E. E.	40
Whitehead, J.	23
Williams, A.	121
Woodward, A. T.	137

TABLE OF CASES CITED.

[*The letters* "R. v." *in criminal cases are omitted.*]

	PAGE
Ashley (1843)	167
Ball, H. (1924)	48
Boulton and Parke (1871)	95
Burton, H. J. (1922)	36
Cadwell (1927)	40
Chapman (1838)	11
Christie (1914)	24
Davies, J. (1897)	119
Deakin and Smith (1800)	166, 167, 170
Dean, F. (1924)	40
Doherty (1874)	139
Donovan, J. (1925)	70
Fallows and Sexton	167
Feigenbaum (1919)	24
Forde, F. M. A. (1923)	128, 131
Frost (1839)	12
Harris and Others (1922)	25
Harris, Dora (1927)	3, 11, 13
Harrison (1925)	40
Hayton, A. (1925)	36
Hayward (1833)	49, 54
Holden (1838)	11
Ingleson (1915)	82
Jenks *v.* Turpin (1884)	120
Jones, H. (1922)	122—4
Kelly, etc. (1927)	120
Kirby, etc. (1927)	159
Lawes, J. (1928)	126, 130—1, 134
Macdonnell *v.* Evans (1852)	181
Manning (1883)	95
Morris *v.* Godfrey (1912)	120
Mulcahy *v.* R. (1866-7)	95, 99
Murphy, etc. (1837)	95
Noel (1914)	91
Norman, C. L. (1924)	73
Norton (1910)	24
O'Connor, F., etc. (1843)	95
Oxlade (1919)	15

	PAGE
PARNELL, C. S., etc. (1881) ...	95, 99
Pike (1902)	91
Pollman, etc. (1809)	95
Pridmore (1913)	80
QUEEN'S CASE, THE (1820) ...	95, 181
Quinn, etc. (1898)	97
RANKIN, ETC. (1848)	95
TATE (1908, 1910)	23, 25
Thomas, W. (1784)	167
Thorpe, C.	48
WRIGHT, G. (1922)	122—4
YOUSRY, S. (1914)	180
VAUX (1590)	144

TABLE OF STATUTES.

PAGE

1828 9 Geo. 4, c. 69 (Night Poaching Act), s. 2 79

1853 16 & 17 Vict. c. 119 (Betting Act), s. 3 159

1854 17 & 18 Vict. c. 38 (Gaming Houses Act), s. 4 159

1861 24 & 25 Vict. c. 96 (Larceny Act),
s. 80 ..... 85—88, 91, 92
s. 85 ..... 85—88

1865 28 & 29 Vict. c. 18 (Criminal Procedure Act), s. 5 ..... 181—2

1869 32 & 33 Vict. c. 62 (Debtors Act), s. 13, sub-s. 1 114

1870 33 & 34 Vict. c. 23 (Forfeiture Act), s. 4 ..... 59—63

1871 34 & 35 Vict. c. 112 (Prevention of Crimes Act), s. 7 ..... 40—1

1883 46 & 47 Vict. c. 52 (Bankruptcy Act), s. 16 92

1885 48 & 49 Vict. c. 69 (Criminal Law Amendment Act), s. 3 ... 185—6

1889 52 & 53 Vict. c. 63 (Interpretation Act), s. 38, sub-s. 2 (d) 88 n.

1907 7 Edw. 7, c. 23 (Criminal Appeal Act), s. 4, proviso 83

1915 5 & 6 Geo. 5, c. 90 (Indictments Act),
s. 5 89
s. 21 ..... 59—63

1916 6 & 7 Geo. 5, c. 50 (Larceny Act) 89
s. 21 ..... 85—88, 91
s. 43, sub-s. 3 ..... 86, 91
s. 50 ..... 85—88

1917 7 & 8 Geo. 5, c. 21 (Venereal Diseases Act), s. 1, sub-s. 1 ... 74

1922 12 & 13 Geo. 5, c. 56 (Criminal Law Amendment Act), s. 2
45—6, 125—32, 135

1925 15 & 16 Geo. 5, c. 86 (Criminal Justice Act), s. 40 35

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE BRANSON.

BERNARD GANS.

1928.
21 *May.*

First Charge — First Conviction — Severity of Sentence — Further Evidence for the Crown.

Severity of sentence on a conviction for receiving with guilty knowledge (there being no previous conviction for that offence, but a suggestion by the police that appellant has in fact been so guilty).

The Court is reluctant to hear evidence to that effect.

Appeal by leave of the Court.

Appellant was convicted on April 20, before the Common Serjeant, at the Central Criminal Court, of receiving with guilty knowledge, and was sentenced to three years' penal servitude.

Comyns Carr, K.C. (with him *G. St. John McDonald*), for the appellant who was present:

This transaction should be regarded as a first offence, and the sentence might be reconsidered.

Eustace Fulton, for the Crown:

Further evidence is at the disposal of the Court if required, but the Crown does not request the Court to hear it.

THE LORD CHIEF JUSTICE: This appellant, Bernard Gans, was convicted with one Saunders at the Central Criminal Court of feloniously receiving a bar of silver. Saunders was sentenced to twelve months' imprisonment with hard labour, and the appellant to three years' penal servitude. Applica-

1928
21 *May*.

BERNARD GANS.

Hewart, L.C.J., Salter, J., Branson, J.

tion was made at the last sitting of the Court for leave to appeal, which was granted with regard to sentence only.

The facts of the case are simple. A bar of silver, stamped with the mark A. K. and a number, was deposited in the strong room of a smelting works at Finsbury. A detective saw Saunders go into the appellant's shop with the bar. A boy saw the appellant count out £15 and give them to Saunders, and the detective saw Saunders leave the shop counting the money. The appellant then sent the boy out with the bar to have it weighed, and the detective took the boy with the bar back to the shop. The bar was identified.

At the trial the appellant gave evidence on his own behalf. He said he had known Saunders for some time, and that Saunders brought the bar to him to be weighed. He gave Saunders £15 for it as a deposit. He gave £15 only because he thought the silver was of inferior quality. The boy, giving evidence, said that the appellant sent him with the bar to have it weighed.

The appellant is thirty-three years of age, and is of Dutch nationality. Several years ago he was convicted of trafficking in gold—selling sovereigns for twenty-three shillings—and was fined £100 and his gold was confiscated. He was described by the police as an experienced receiver of jewellery, but there had been no previous conviction for that offence. The Common Serjeant dealt only with this case, although, he said, "the police have a strong view about you."

At the previous sitting of this Court, counsel made a powerful appeal on behalf of the appellant, submitting that, if this was to be treated as a first offence, the sentence was excessive. The Court was disposed to take that view, and granted leave to appeal, with the warning that at the hearing of the appeal the Crown might desire to call more evidence. Counsel on behalf of the Crown has some material, but does not request the Court to hear it. There are manifest difficulties in hearing evidence in this Court which might have been submitted in the Court below.

1928.
21 *May.*

BERNARD GANS.

Hewart, L.C.J., Salter, J., Branson, J.

I am far from saying that this should necessarily have been treated as a first offence. It may be that, considering all the evidence, the skill and the apparent experience of a prisoner, a court may conclude that although he is charged for the first time, he is not a first offender. But having regard to all the facts, we are of opinion that in this case a sentence of eighteen months' imprisonment with hard labour is adequate. It is desirable that the appellant clearly understand that if he is again convicted of this offence he will not be dealt with so leniently.

Sentence reduced.

Solicitors—W. Gipps Kent & Son, for appellant.

C. B. P.

The Court, constituted of the same members, sat on May 22.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACKINNON.

STANLEY LIDDLE.

11 *June.*

Defence ex improviso — Alibi — *Rebutting Evidence — Adjournment — Perjury suspected—Witnesses called by the Court of Trial.*

The defence of *alibi* is not *ex improviso* within the principle of *Dora Harris*, 1927, 2 K. B. 587; 20 Cr. Ap. R. 86. The fact that the defendant does not set up this defence before the magistrates does not dispense the prosecution from giving evidence of his whereabouts at the material time.

It is not, *semble*, a proper course for a judge at a trial who suspects perjury of a witness to adjourn the hearing in order that rebutting evidence may be called.

1928.
11 *June.*

STANLEY LIDDLE.

Hewart, L.C.J.
Avory, J.,
MacKinnon, J.

Appeal against conviction and sentence; and application for leave to call further evidence.

Appellant was convicted before the Deputy-Chairman, at the Middlesex Sessions, on May 10, of larceny, forgery, uttering and obtaining by false pretences, and was sentenced to five years penal servitude.

At the trial in the first instance, the appellant in defence set up an *alibi*, in proof of which he called his cousin Louise Plumb. At the close of the defence, the Deputy-Chairman adjourned for three days before summing up. On resumption, evidence was called to rebut Plumb's evidence, and Plumb was recalled and cross-examined again.

At the close of his summing-up, the Deputy-Chairman said: " . . . there are other charges of uttering cheques, and, if you desire it, you may have a list of those charges."

Appellant, in person.

Fulton (*G. St. John Macdonald* with him), for the Crown, could not attempt to justify the "other charges" being put to the jury in summing up, if they were charges other than those contained in the indictment, but the passage although obscure would appear to refer to the uttering charges in the indictment to which the learned gentleman had not previously referred.

AVORY, J.: What do you say about the point which, in my experience, has never happened before, of a criminal trial being adjourned for several days in order that the presiding judge may call a witness to prove that a witness called for the defence, has been committing perjury?

Fulton: My Lord, if the evidence which was called in rebuttal I am speaking now with regard to the evidence, and no doubt your Lordship is referring to it too, of the Matron of the Hospital—if that evidence was properly called in rebuttal, in my submission, although it would be unusual in

one's experience that a time should elapse, it would not alter the principle if it were proper evidence in rebuttal—the fact that it was called three days later would not alter the principle.

AVORY, J.: That is the question I am putting to you. Is it proper evidence or proper procedure for a judge because he thinks that a witness for the defence has committed perjury, to adjourn the trial in order that witnesses may be called to prove the perjury?

Fulton: I should not quite put it in that way, although that might be the effect of it. My submission would be that the evidence was called in rebuttal, and if one looks at the course of the police-court proceedings, at no time in the course of those proceedings, was it suggested with regard to March 21, that there was going to be evidence of an *alibi*, by cross-examination or by any statement, and at no time was it suggested that the answer to the charge of April 13, was one which the prisoner eventually gave in the witness box.

AVORY, J.: Surely the accused had denied that he was the person that had been to the shops?

Fulton: I do not think he had, if I may respectfully say so. As far as I recollect he had made no answer whatever to the charge, either by any statement or by any cross-examination, to say whether he was there or whether he was not. As far as his statement at the police-court was concerned, when he was committed for trial what he said was, that he had nothing to say and no witnesses here. That was what the position was on his committal. Therefore, in my submission to your Lordships, when he went into the witness box and told this story about an *alibi* and told a story about the events for the first time, that was a matter which arose suddenly, and could not have been foreseen by the prosecution.

THE LORD CHIEF JUSTICE: It is not the first time that you have heard of an *alibi* being set up at the trial, which has not been heard of before, is it?

1928, 11 *June*.

STANLEY LIDDLE.

Hewart, L.C.J., Avory, J., MacKinnon, J.

Fulton: Is not the principle of law clear that if something is set up suddenly, and cannot have been foreseen, the learned judge may call evidence?

AVORY, J.: "—cannot have been foreseen": I am suggesting to you that an *alibi* ought always to be foreseen.

Fulton: That may be your Lordship's experience. I can only defend it upon the ground that it was a matter which could not have been foreseen; and if it was, the learned Chairman on his own motion, if he thought fit, in the interests of justice to do so, was entitled to call evidence in rebuttal; that is to say, to call evidence from the hospital to say that the evidence which could not have been foreseen, was not true evidence, and so to rebut it.

AVORY, J.: I want to know how far this principle is to be carried. Is a judge to be entitled, because he doubts whether a witness, who is called for the defence, is telling the truth, to say: "I will adjourn this trial *sine die* in order that the police may make enquiries and find out whether the witness has been speaking the truth"?

Fulton: It must depend upon the particular facts of course, in a particular case. In this particular instance the officer was instructed to make some enquiry from the hospital, which the learned judge apparently thought could have been given in evidence until it was objected to, and for that reason there was a second adjournment of the case in order that the evidence of the matron herself might be available for the court. In my submission that is evidence which would be properly called by the learned judge in rebuttal.

AVORY, J.: I do not know where it is to end. It seems to me to be a most inconvenient practice, because if the judge is to adjourn the trial in order that the police may try to find some evidence to contradict a witness for the defence, then when the witness is called, the defence might apply for a further adjournment in order to prove that the witness who has been called on behalf of the police is not to be relied on.

1928.
11 *June*.

STANLEY LIDDLE.

Hewart, L.C.J., Avory, J., MacKinnon, J.

Fulton: I agree that the principle, if improperly applied, might lead to abuse.

AVORY, J.: There would be no end to a case at all at that rate.

THE LORD CHIEF JUSTICE[1]: This appellant, Stanley Liddle, was convicted at the Middlesex Sessions upon an indictment containing seven counts for stealing and receiving a cheque book, for forging and uttering cheques, and for obtaining money by false pretences. He was sentenced to five years' penal servitude, and now appeals against both conviction and sentence.

The course of the case was rather unusual. The indictment charged that the appellant on March 21 stole and received a cheque book, the property of one Dr. Shuter, that on the same day, March 21, he forged and uttered a cheque for £5 15s.; that on March 22 he forged and utterred a cheque for £3 10s.; that on April 13 he obtained a bottle of whisky and £3 5s. by false pretences, that is to say, by a worthless cheque, and on the same day he forged and uttered a cheque for £4 10s.

Dr. Shuter, who lives in Chiswick, missed his cheque book which contained ninety-nine unused cheques, about March 20. He missed it from his desk, and the evidence against the appellant was that he was dealing with some of the cheques taken from that book, and also there was the fact that came out in cross-examination, that he had been a patient of this doctor and had been in the room alone where the cheque book had been kept.

Dr. Shuter gave evidence that the cheques referred to in the various counts were forged and were taken from the book. For some reason or other he was called or recalled four times to prove the larceny, and to prove each of the forgeries.

With regard to the particular counts, a jeweller in

(1) This judgment is a transcript of a shorthand report supplied by the courtesy of the Clerk of the Peace for Middlesex.

1928.
11 *June*.

STANLEY LIDDLE.

Hewart, L.C.J., Avory, J., MacKinnon, J.

Hammersmith said that about a quarter to eight in the evening on March 21 the appellant came in and bought a ring, of which the price was three guineas. He produced a cheque for £5 15s. purporting to be drawn by Dr. Shuter, and payable to Dennis Williams, and said that he had supplied Dr. Shuter with goods and had received that cheque in payment. In the presence of the jeweller the appellant indorsed the cheque, saying that his name was Dennis Williams, of an address which he gave in Hammersmith. The appellant then chose a watch of which the value was £3, and gave the cheque and 8s. cash to Mr. George the jeweller, and took the ring and the watch. In fact the cheque was one of the cheques taken from Dr. Shuter's book and was forged, and, when the appellant was arrested on April 13, he was actually wearing that watch.

On March 22 Mr. Craig, a dealer in musical instruments in Chiswick, received a call from the appellant, who bought a gramophone, price £2 7s. 6d. He produced another cheque purporting to be drawn by Dr. Shuter for £3 10s., payable to Kenneth McDonald, said that he was Kenneth McDonald, and endorsed the cheque and the dealer gave him the change, 22s. 6d. and the gramophone. He was picked out by Mr. Craig as the man who did those acts.

On April 13 the appellant went to an off-licence shop in Chiswick, said he wanted some goods sent to Dr. Shuter, and gave an order amounting to 25s., produced a cheque for £4 10s. payable to Dennis Lownsden, purporting to be signed by Dr. Shuter, and he then and there endorsed that cheque "Dennis Lownsden." He received change, £3 5s., and took a bottle of whisky with him.

It is not necessary to deal further with those facts. The appellant gave evidence on his own behalf and said that he was not the man who went to Mr. George's shop on March 21. He said that he was ill in bed on that day, at No. 13 Chiswick Road, and that he did not go to Mr. Craig's shop on March 22. He said that about 2 o'clock on April 13 he was in a tea shop

1928.
11 *June.*

STANLEY LIDDLE.

Hewart, L.C.J., Avory, J., MacKinnon, J.

in Hammersmith Broadway with his cousin, Miss Plumb, and that while he was there a friend of his, Dennis Lownsden, came in and showed him the watch which Mr. George had identified and asked him to buy it, and he bought it for £1; that Lownsden then asked him to change a cheque for £4 10s. and produced the cheque for £4 10s. signed by Dr. Shuter. In the evening he said he wanted to see Dr. Shuter as he had already seen him as a patient on several occasions, but he thought that he would change the cheque at the off-licence shop as the manager would know that the cheque would be perfectly right, and therefore he endorsed the cheque and cashed it there, but there was nothing whatever mentioned about sending any goods to Dr. Shuter.

Louisa Plumb was called and she said she was a nurse at a hospital in Chatham, that she was a cousin of the appellant, and she said with regard to March 22 and 23: "On the 22nd, it was a Wednesday; it would be about the 22nd I should think." In fact March 22 was a Thursday, but she said it was on her day off, which was a Wednesday, she came up, and on that day she did see the appellant, who was in bed at 13 Chiswick Road and was very ill and very sick. She said she was there from 2 o'clock in the afternoon till 6 o'clock in the evening, that he was very feeble and it would not have been possible for him to go out. She did not see him on the Thursday, but she said that on April 13 she did go to a tea shop about 4 o'clock in the afternoon and met the appellant there and that a man she did not know came in and handed a watch to the appellant, who gave him £1, and the man then handed the appellant a cheque which she saw was for £4 10s.

Thereupon the learned counsel for the appellant addressed the jury. But the learned Deputy-Chairman said that he would sum up on the following Monday because he was going to make further inquiries. Counsel for the prosecution had, in the meantime, observed that he did not wish to address the jury.

1928.
11 *June.*

STANLEY LIDDLE.

Hewart, L.C.J., Avory, J., MacKinnon, J.

On the following Monday the learned Deputy-Chairman said that he had directed certain inquiries to be made and that he was going to call a witness to prove certain facts. The appellant's counsel objected, but nevertheless the Deputy-Chairman called and examined a witness named Hemming from Brixton Prison. That witness stated that the appellant was admitted to the prison on April 14, that Miss Plumb on April 17 had visited him there and on ten subsequent days, and that there were records of three sums of money having been sent out of the prison to her. The appellant, it was said, had also sent out twenty-nine extra letters, but there was no record kept of the names of the persons to whom they were sent. It is to be observed that not one of those matters had been put either to the appellant or to Miss Plumb herself.

Next the learned Deputy-Chairman recalled the detective and asked him whether he had sent an official message to Chatham, and he said: "Now, be careful about this, officer: having regard to that message and having heard the evidence given by Miss Plumb on Saturday, what do you say?" Objection was taken and the Deputy-Chairman adjourned the case to the following Thursday.

Then on Thursday, May 16, the Deputy-Chairman called Miss Halland, the matron of the hospital, and examined her. Miss Halland said that Miss Plumb was employed temporarily on the staff of the Medway Hospital, that she entered upon the service on March 19, that she had two hours off duty each day and no more till March 26, and that on March 26 she had the whole day off. Miss Halland added that Miss Plumb had other days or parts of days off after that, but that on April 13 she was off duty only from 10 to 12 o'clock in the morning.

Thereupon Nurse Plumb was recalled by the Deputy-Chairman and questioned by him. She said that she had had letters from the appellant, but had torn them up, and had received some money from the appellant. About

1928.
11 *June.*

STANLEY LIDDLE.

Hewart, L.C.J., Avory, J., MacKinnon, J.

March 21, she said it must have been the wrong date, but about April 13 she felt sure.

Another warder was then called and he gave evidence about the visits that Miss Plumb had paid to the prisoner; and when all that had been done the appellant's counsel addressed the jury again, and after dealing with the cheques which were said to have been stolen the Deputy-Chairman added the words to which attention has been directed, words which are undoubtedly ambiguous, but it may well be, as has been suggested, that he was referring to the counts in the indictment later than counts one and two.

In those circumstances it is said that this trial has been unsatisfactory, and in particular, that the presiding judge not only called evidence after the case had been concluded, but called evidence involving adjournments of the trial to deal with a matter that had not arisen suddenly *ex improviso*, but might well have been foreseen, and that the course which was taken was not only irregular but gravely to the prejudice of the accused.

The matter was considered in the case of R. *v.* DORA HARRIS, reported in *Law Reports*, 1927, 2 K. B. 587 [96 L. J. K. B. 1069; 137 L. T. 535; 28 Cox C. C. 432; 91 J. P. 152; 43 T. L. R. 774; 20 Cr. Ap. R. 86; c.q.]. In that case this Court held that "a judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice," but that in order that injustice should not be done to an accused person, a judge should not call a witness in a criminal trial after the case for the defence is closed, except in "a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on the part of the prisoner, otherwise injustice would ensue."

The judgment of the Court, at p. 594, says this: "The case of R. *v.* CHAPMAN and R. *v.* HOLDEN established the proposition that the presiding judge at a criminal trial has

1928.
11 *June.*

STANLEY LIDDLE.

Hewart, L.C.J., Avory, J., MacKinnon, J.

the right to call a witness not called by either the prosecution or the defence, and without the consent of either the prosecution or the defence, if in his opinion this course is necessary in the interests of justice. It is true that in none of the cases has any rule been laid down limiting the point in the proceedings at which the judge may exercise that right. But it is obvious that injustice may be done to an accused person unless some limitation is put on the exercise of that right, and for the purpose of this case we adopt the rule laid down by Chief Justice Tindal in REG. *v.* FROST, where the Chief Justice said "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown.'" So far, that is the citation from Tindal, C.J. Then the judgment in HARRIS'S CASE proceeds: "That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the judge after the case for the defence is closed, and that the practice should be limited to a case where a matter arises *ex improviso*, which no ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue."

In that particular case this Court held, as appears at p. 596 [L.R.]: "In the circumstances, without laying down that in no case can an additional witness be called by the judge at the close of the trial after the case for the defence has been closed, we are of opinion that in this particular

1928.
11 *June.*

STANLEY LIDDLE.

Hewart, L.C.J., Avory, J., MacKinnon, J.

case the course that was adopted was irregular, and was calculated to do injustice to the appellant Harris."

Now, to deal with the facts of the present case, it is quite clear, first of all, that the learned Deputy-Chairman adjourned the trial, and adjourned it more than once, when apparently all the evidence had been given, because he was of opinion that one of the witnesses had been committing perjury; and accordingly he called, on his own initiative, witnesses for the purpose of proving that one of the witnesses for the defence had been committing perjury. More than that, it appears also that the matter which was in question was a defence of an *alibi* set up by the prisoner—the commonest of all defences; there is nothing *ex improviso* about such a defence as that. It did not require ingenuity, but only ordinary common sense, to conceive that a person who was charged might be going to say that he was not the man.

In the circumstances it appears to us that neither of the conditions laid down in the case of HARRIS was here fulfilled. Nothing had suddenly emerged which required the calling of witnesses, and the circumstances in which the witnesses were called were such as gravely to imperil the defence and to put the defence to an unfair disadvantage. If the same reasoning were to apply, it would have been perfectly open for the defendant, on the second of these adjourned hearings, to require a further adjournment in order that he might call, in his turn, rebutting evidence, and so the inquiry might wander on indefinitely.

It seems to us that the course which was taken was irregular, was not rendered necessary by any emergency, and was likely to cause injustice to the accused. In these circumstances we think that this appeal must succeed and this conviction must be quashed.

There are other charges, we are told, against the appellant, but with those charges, for the moment at any rate, this Court has nothing to do.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRANSON AND MR. JUSTICE CHARLES.

1928.
25 *June.*

ROBERT LEONARD HOBBS.

Youthful Offenders—Penal Servitude—Borstal Treatment—Medical Opinion not conclusive—Report of the Judge at the Trial—Experts' Report to the Court.

The Court, if in doubt about the desirability of sending a youthful offender to Borstal, may call for expert reports.

Appeal against sentence.

Appellant was convicted on May 18 before Wright, J., at the Central Criminal Court, of wounding with intent to cause grievous bodily harm, and was sentenced by Wright, J., to four years' penal servitude.

Appellant, who was sixteen years of age, had been educated in the Shaftesbury Society's school, and had gone thence into the training ship *Arethusa*, being desirous of joining H.M. Navy. He failed for the Navy, owing to defective eyesight, but remained in the *Arethusa* to qualify as a sea cook, in order to join the Mercantile Marine. On April 7, 1928, he was reported to the officer of the watch, by another boy named Lowly, for unscrewing a locker. The appellant brooded over this, fearing that it might ruin his career. It was in fact a trivial offence, and had not even been brought to the captain's notice, but from that time the appellant had a grievance against Lowly, and on April 21, while on duty in the galley, he sent for Lowly and, when the latter entered the galley, deliberately struck him on the head with a fire-bar, causing a serious wound to the skull, which might easily have caused death. Lowly fell to the floor. The appellant stood mute in the galley until the schoolmaster came in, who said to him: "You might have

1928.
25 *June.*

ROBERT LEONARD HOBBS.

Hewart, L.C.J., Branson, J., Charles, J.

killed that boy." Appellant said: "I meant to do him in." This he afterwards repeated when charged before the captain.

At the Central Criminal Court appellant was indicted for (1) wounding Lowly with intent to murder him; (2) wounding him with intent to cause grievous bodily harm. He pleaded guilty to the second count. The prison medical officer, giving evidence, was of opinion that appellant was three years retarded mentally, and that he needed observation, and suggested that he could undergo this and any necessary treatment in a prison infirmary. In consideration of this, the court passed sentence of four years' penal servitude.

J. F. Eastwood, for the appellant, who was present, submitted that four years' penal servitude was an excessive sentence, even if the appellant was unfit for Borstal treatment:

OXLADE, [1919] 2 K. B. 628; 14 Cr. Ap. R. 65; 88 L. J. K. B. 1318; 83 J. P. 218; 122 L. T. 343; 26 Cox, C. C. 530: *sen. red.* In fact, he was not unfit, as the tests he had passed with a view to joining the Royal Navy and the character he had in the *Arethusa,* proved that he was not retarded mentally. When the offence was committed, he had been all day in the galley, where the temperature was high. If the Court could deal leniently with him, it would be to his best interest to return to the *Arethusa* and continue the career in which he was ambitious.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Central Criminal Court of wounding with intent to cause grievous bodily harm, and was sentenced to four years' penal servitude, and now appeals against that sentence by leave. We know that if Wright, J. had had before him the reports of the experts he would have passed a sentence, under the Prevention of Crime Act, 1908, of detention in a

1928.
25 *June*.

ROBERT LEONARD HOBBS.

Hewart, L.C.J., Branson, J., Charles, J.

Borstal institution. It has been contended that a proper course would be, not to send the appellant to a Borstal institution, but to allow him to continue his career on the sea. Anxious as this Court is to give every opportunity to the young, we cannot pass over this offence. Borstal treatment is often misunderstood. The term is a maximum prescription, and the minimum may be very short, and depends upon the authorities of the institution. We now pass the sentence that Wright, J. would have passed had he been in possession of all the certificates concerning the appellant's state of mind. The sentence of the Court is that the appellant be detained in a Borstal institution for three years.

Sentence varied and reduced.

Solicitors—Thorne, Owles & Rawstorn, Southend, for appellant.

C. B. P.

[The Court (The Lord Chief Justice, Salter and Acton, JJ.), also sat on July 9].

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ACTON AND MR. JUSTICE BRANSON.

HENRY ERNEST FRAMPTON.

1928.
16 *July.*

Capital Charges—Speech of Counsel for the Defence.

Counsel defending in a capital case should be restrained in referring to the probable consequences of a verdict of guilty.

Appeal against conviction.

Appellant was convicted on June 25, 1928, at Maidstone Assizes, before Avory, J., of murder, and was sentenced to death.

M. Garsia, for the appellant, who was present.

W. T. Monckton, for the Crown, was not called upon.

Only one point in the judgment of the Lord Chief Justice is reported.

At the beginning of his summing up, the learned judge said:

"The observations of counsel for the defence on the probable sentence were not calculated to assist you, but to deter you from doing your duty. If juries were deterred by such considerations from giving effect to clear evidence the consequences to the public would be serious."

It is satisfactory that such appeals to juries on behalf of prisoners charged with capital offences do not always succeed.

The criticism of this summing up cannot be supported, and the appeal must be dismissed.

Appeal dismissed.

Solicitors—Wallace, Watson & Flint, for appellant.

C. B. P.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ACTON AND MR. JUSTICE BRANSON.

1928.
23 *July.*

ROGER GEORGE SEELY.

Obtaining by False Pretences—Words used not necessarily implying Ownership.

False pretences are not proved unless the falsity of words used is unequivocal and intentional.

Appeal against conviction.

The appellant was convicted on June 26 before the Chairman, at the East Sussex Sessions, of obtaining money by false pretences, and was sentenced to six months' imprisonment with hard labour.

The appellant hired in London a motor car, on behalf of a gentleman in Brighton. He paid £3 deposit, and then took and drove the car to Brighton. On arriving there, and before delivering it to the gentleman, he found that the car required some repairs. The appellant therefore took it to the garage of one Wise, who informed him that it needed some new parts, which could not be obtained for some days. The appellant, being desirous of returning to London by train, asked Wise to lend him £5 to enable him to do so. To this Wise demurred. The appellant then said: "Surely the car is worth £5." Wise then advanced £5. The appellant was convicted on these facts as having falsely implied that the car was his own property.

Eric Neve, for the appellant, who was present.
Edward Marjoribanks, for the Crown.

THE LORD CHIEF JUSTICE, after reciting the above facts, proceeded: There are two difficulties about this conviction:

1928.
23 *July.*

ROGER GEORGE SEELY.

Hewart, L.C.J., Acton, J., Branson, J.

(1) The appellant never said that the car was his own, and there is the question whether the words "Surely the car is worth £5" certainly conveyed the meaning that it was his car; (2) At the trial, on being asked whose car he thought it was throughout the transaction, Wise replied: "I had never the slightest doubt that it was his." That belief had been present to his mind before the alleged false pretence. On this evidence, this conviction cannot be sustained, and the appeal must be allowed.

Conviction quashed.

Solicitors—Gordon, Gardiner, Carpenter & Co., agents for F. H. Carpenter, Brighton, for appellant.

C. B. P.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE ACTON.

WILLIAM FREDERICK DUNBAR.

1928.
27 *July.*

Principles on which the Court reviews sentences.

Application for leave to appeal against sentence.

The applicant pleaded guilty on June 28, 1928, before Branson, J., at the Central Criminal Court, to wounding with intent to cause grievous bodily harm, and was sentenced to seven years' penal servitude.

C. Abbott, for the applicant, who was not present.

THE LORD CHIEF JUSTICE: This appellant, William Frederick Dunbar, was indicted on two counts: the first charged him with wounding with intent to murder; the second with wounding with intent to cause grievous bodily harm. The prosecution mercifully accepted a plea of guilty on the

1928.
27 *July.*

WILLIAM FREDERICK DUNBAR.

Hewart, L.C.J., Salter, J., Acton, J.

second count, and did not proceed on the first count. It was only good fortune—if that phrase can be used in such a case as this—which saved the appellant from a charge of wilful murder. He met a young woman, with whom he had previously been on friendly terms, and after a few words, drew a razor and slashed her face. She ran away, and he pursued her and wounded her again, severely in the neck. She fortunately recovered, but will be marked for life. It is impossible to revise this sentence of seven years' penal servitude. It has been suggested on behalf of the applicant that there might be "some slight reduction of the sentence." This Court does not make slight reductions of sentences. This Court only interferes on matters of principle and on the ground of substantial miscarriages of justice.

Application dismissed.

Solicitor for applicant, J. J. McIntyre.

C. B. P.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE BRANSON.

1928.
30 *July.*

PERCIVAL LEONARD TAYLOR, JAMES WEAVER AND GEORGE THOMAS DONOVAN.

Statement of Prisoner after Verdict and before Sentence—Arrest of Judgment.

Observations on circumstantial evidence.

Applications for leave to appeal against conviction.

The applicants were convicted on July 13, 1928, before Avory, J., at Lewes Assizes, of murder, and were sentenced to death.

Gates, for Taylor and Weaver (under section 10 of the Criminal Appeal Act), who were present.

1928.
30 *July*.

PERCIVAL LEONARD TAYLOR. JAMES WEAVER. GEORGE THOMAS DONOVAN.

Hewart, L.C.J., Swift, J., Branson, J.

Neve, for Donovan (under section 10 of the Criminal Appeal Act), who was present:

When the prisoner Donovan was called upon after verdict and before sentence, he wanted to make a statement, but was not permitted to do so.

Cassels, K.C. (with him *N. H. King*), for the Crown, submitted that the only reason for calling upon a convicted prisoner in felony was to give him an opportunity of moving in arrest of judgment upon a point of law. Such an instance arose where a pregnant woman was convicted of murder. This appellant could have nothing to submit in law.

THE LORD CHIEF JUSTICE, in the course of his judgment, said: Anything a prisoner might say on being called upon before sentence could only refer to certain points of law, and could only be effective in arrest of judgment.

It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

Applications dismissed.

C. B. P.

THOMAS HENRY HARRY.

1928.
31 *July*.

Habitual Criminal—"Persistently leading a dishonest life"—Primary Sentence of Penal Servitude—Preventive Detention.

A direction on the allegation of being a habitual criminal must deal with an interval of honest work.

Appeal against sentence and application for leave to appeal against conviction of being a habitual criminal.

1928.
31 *July.*

THOMAS HENRY HARRY.

Hewart, L.C.J.
Swift, J.
Branson, J.

Appellant pleaded guilty on July 16, 1928, before the Deputy-Recorder, at the Caermarthen Borough Sessions, to larceny, and was sentenced to three years' penal servitude; he was also convicted of being a habitual criminal, and was sentenced to five years' preventive detention.

Appellant, who was present, was not represented.

Daniel Johns, for the Crown, did not support the conviction of being a habitual criminal.

THE LORD CHIEF JUSTICE: The substantive offence, to which the appellant pleaded guilty, is clear. With regard to the conviction of being a habitual criminal, we find a curious collection of all possible errors, only a few of which it is necessary to mention. The evidence showed that the appellant had been released from prison on licence on March 19, 1928, and that he obtained work as a labourer, in which he continued until his licence expired. There was at the trial evidence that the appellant committed several offences of larceny, but no evidence that he admitted them. Evidence that warrants were out against him was admitted. The statutory notice said that he admitted them, whereas in fact he said that he knew nothing about them. In his summing up, the Deputy-Recorder said that it was "alleged" that he had committed several offences of larceny, and he used the phrase "has been persistently leading a dishonest life." The honest work which the appellant had done for eight weeks was ignored. On the jury returning their verdict, the Deputy-Recorder said: "I must give effect to the verdict that the prisoner is a habitual criminal, and to do that I have no alternative but to give a term of penal servitude." The sentence of penal servitude was passed because the Deputy-Recorder was under the impression that he was bound to order preventive detention, and that he could not do so without first passing a sentence of penal servitude. That is not the law at all. It is only if the substantive crime is serious enough

for three years' penal servitude that preventive detention can be imposed. In this case neither sentence can be sustained. The three years' penal servitude must be reduced to twelve months' imprisonment with hard labour, and the finding that the appellant is a habitual criminal and the order for preventive detention must be quashed.

1928.
31 *July.*

THOMAS HENRY HARRY.

Hewart, L.C.J., Swift, J., Branson, J.

Sentence reduced; conviction as habitual criminal quashed.

C. B. P.

JOB WHITEHEAD.

1928.
31 *July.*

Corroboration—Non-denial of a Charge—Silence of the Accused.

It is not corroboration of incriminating evidence that the accused did not deny the charge or was silent about it.

It is not a proper inference from a person's actions that a particular statement had been made to that person.

A witness cannot be "corroborated" by himself.

Appeal against conviction and sentence.

The appellant was convicted on June 23, before Humphreys, J., at the Swansea Assizes, of carnal knowledge of a girl under sixteen, and was sentenced to fifteen months' imprisonment with hard labour.

Bertram Reece, for the appellant (under section 1 of the Criminal Appeal Act), who was present:

The judge misdirected the jury that the silence of the appellant, when charged, might be construed as corroboration; also, that although what the prosecutrix had said to her mother when discovered to be pregnant was not admissible as evidence, they—the jury—might deduce what she had said from the action taken by the mother thereon.

Langman, for the Crown, referred to *Tate*, [1908] 2 K. B. 680; 1 Cr. App. R. 39; c.q. [1910], 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; *Norton*,

1928.
31 *July*.

JOB WHITEHEAD.

Hewart, L.C.J.
Swift, J.
Branson, J.

74 J. P. 375; 54 S. J. 60; 26 T. L. R. 550; 5 Cr. App. R. 65; c.q. [1910] 2 K. B. 496; *Christie*, [1914] A. C. 545; 83 L. J. K. B. 1097; 24 Cox C. C. 249; 78 J. P. 321; 111 L. T. 220; 30 T. L. R. 471; 58 S. J. 515; 10 Cr. App. R. 141; c.q. *Feigenbaum*, [1919] 1 K. B. 431; 14 Cr. App. R. 1; s.r. 88 L. J. K. B. 577; 83 J. P. 123; 26 Cox 387; 120 L. T. 572.

THE LORD CHIEF JUSTICE: This appellant was convicted of unlawful carnal knowledge of a girl under the age of sixteen. At the trial he gave evidence, denying the charge. The judge, in summing up to the jury, used these words: "Then there comes something which you may regard as something more important in the way of corroboration. In February the mother took the girl to a doctor, who said the girl was pregnant. It is perfectly clear that the girl must have said that the prisoner was responsible for her condition, because the prisoner was at once charged with this offence. When the summons was served upon him he did not deny the charge. Such silence may be corroboration, and whether that is corroboration is for you to decide. It is for you to say whether a respectable man would at once deny such a charge. All he in fact said was: 'I do not want to say anything about it now.' That is no sort or kind of denial."

It is said that the opening part of that passage might convey to the jury that, though the girl's statement was not admissible, they might infer from the action of the mother what she had said. That would be doubly wrong: the jury ought not so to regard the conduct of the mother; and if they were to infer "that the girl must have said that it was the prisoner," that would not be corroboration. Corroboration should come from another person altogether.

When the police officer served the summons, he cautioned the appellant in the usual way, and the appellant said: "I do not want to say anything about it now," and the jury were directed that it was for them to decide whether there was

corroboration or not according as they thought whether a respectable man would or would not deny such a charge; if they thought the failure on appellant's part to make a denial when the charge was sprung upon him by the police officer corroborated the girl's evidence then they would probably accept more readily that evidence as being corroborated to that extent. This is a misdirection. It goes further than anything in the case of *Tate*. The conviction must be quashed.

1928.
31 *July*.

JOB WHITEHEAD.

Hewart, L.C.J., Swift, J., Branson, J.

Conviction quashed.

C. B. P.

WILLIAM YARWOOD.

1928.
31 *July*.

Habitual Criminal—Association with Thieves.

Evidence that accused is an associate of thieves is not admissible, as an allegation of being a habitual criminal, unless notice has been given of it.

Appeal against sentence, application for leave to appeal against convictions.

The appellant was convicted on July 4, before the Chairman at the Cheshire (Knutsford) Sessions, of housebreaking and of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

Trevor Lloyd, for the Crown, could not support the conviction of being a habitual criminal. He referred to *Harris and others*, [1922] 2 K. B. 543; 16 Cr. App. R. 94.

The appellant, who was present, was not represented.

THE LORD CHIEF JUSTICE: With regard to the conviction of house-breaking, the case is clear, and there is no reason for interfering with the sentence of three years' penal servitude. It is very different with the charge that the appellant was

1928.
31 *July.*

WILLIAM YARWOOD.

Hewart, L.C.J., Swift, J., Branson, J.

a habitual criminal. At the trial, a police officer was asked: "Can you tell the jury generally about this man's mode of life?" to which the officer replied (*inter alia*) that he was "associating with thieves." Asked "Since he last came out of prison, what sort of life has he led?" he replied, "Since August he has been associating with thieves." Now in the statutory notice there was no reference to association with thieves. The conviction of being a habitual criminal and the sentence of five years' preventive detention must be quashed.

Conviction as habitual criminal quashed.

C. B. P.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE BRANSON.

1928.
17 *August.*

MICHAEL MACDONALD.

Bail—Long Vacation.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at the Sheffield City Quarter Sessions on July 12 of knowingly receiving stolen property, and was sentenced to eighteen months' imprisonment with hard labour.

The Court, in granting the application, offered applicant, in view of the interval before the hearing, bail on his own recognisance of fifty pounds and that of a surety in the same sum.

Application granted.

WILLIAM JONES.

1928.
17 *August.*

WILLIAM JONES.

Hewart, L.C.J., Swift, J., Branson, J.

Defence of Alibi—*Inquiries by Order of Court*—*Fresh Evidence*—*Observations by the Court on the Failure of Accused Persons to Give Information to the Police which might Establish their Innocence and on their Reserving their Defence.*

The defence of *alibi* should be set up at the earliest possible moment.

Appeal against conviction by leave of the Court (on July 10, when an order was made for further inquiries by the police).

Appellant was convicted at the Hampshire Sessions on July 10 of garage-breaking, and was sentenced by the Chairman to nine months' imprisonment with hard labour.

A. T. Denning, for the appellant (under section 10 of the Criminal Appeal Act), who was present.

E. A. Hawke, for the Crown.

Denning, by leave, called and examined *S. J. Dibben*, an omnibus conductor: he was not cross-examined, *Hawke* stating that, in view of this evidence, he could not support the conviction.

The facts sufficiently appear in the judgment.

THE LORD CHIEF JUSTICE[1]: This appellant, William Jones, was convicted at the Hampshire Quarter Sessions of breaking into a garage and stealing a motor car. He was sentenced to nine months' imprisonment with hard labour. He applied to this Court for leave to appeal against conviction; on July 30 we granted him leave to appeal and we directed inquiries to be made with regard to certain persons whom he referred to as possible witnesses. The appellant was committed for trial on Saturday, July 7, and it was upon that day that all the evidence in the case was given. On Tuesday July 10 the Court of Quarter Sessions was held and

(1) This judgment is transcribed from a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

1928.
17 *August.*

WILLIAM JONES.

Hewart, L.C.J., Swift, J. Branson, J.

the appellant thereupon pleaded not guilty and asked that the case should be put back till the following Sessions as he had not had time to prepare his defence. He was told that if the case was put back in that way he would have to be detained, and thereupon, instead of giving further information or mentioning what might be done, he said: "I will carry on with the charge now," and accordingly the charge was dealt with. It appeared by the evidence that on the night of Tuesday, June 19, a Mr. Cairns had left his garage, near to Petersfield, locked up, and at 7 o'clock in the morning it was found that the padlock had been broken away and an iron bar was found outside the door and the motor car had been taken away. At 10.50 on the morning of June 20 a Mrs. Hailey was at a place called Lippen Hill, and she then saw a car standing; she said that a man in brown with a brown hat was doing something to the bonnet of the car and went round the car and wiped his hands on the grass, and she said that she paid particular attention to the car because she thought that she recognised it as belonging to a gentleman who had a shoot which her husband looked after, and she said that she said "Good morning" to the man. Another witness, a gamekeeper, was just outside Warnford Lodge, about a mile and a half from the place where the last-named witness was, between noon and one o'clock and he saw a man whom he described as the appellant, dressed in brown, wearing a light brown trilby hat with a round ring at the top. He said that the man was facing down the road, and when the gamekeeper approached him he turned round and looked in the opposite way. Now the car, which had apparently been abandoned, was taken to the drill hall and there Mr. Cairns, the owner, saw it on June 20; it was intact, and a petrol tin which did not belong to Mr. Cairns was at that time, as appears from the depositions, in the car—a very important matter. The witness, Mrs. Hailey, said that on Saturday, June 23, she saw the same man as she had seen on June 20 pass her house. On June 25 the appellant was

1928.
17 *August.*

WILLIAM JONES.

Hewart, L.C.J., Swift, J., Branson, J.

arrested for travelling upon the railway without a ticket, and on that day he was told by a police sergeant that he answered to the description of a man who stole a car on the night of June 19, which was found on the following morning, and he said: "No, not me—can anybody identify me?" He was told that he would be put up for identification, and he was asked whether he cared to say where he was on that night, and to that question the exceedingly unfortunate reply of the appellant was: "No, I shall have to think where I was if I am picked out. They will have to prove it was me"—a most unfortunate answer. He was put up for identification with eight other men and Mrs. Hailey came in and said: "I cannot be absolutely sure but to the best of my belief it is the fourth man from the left" and she thereupon touched the appellant. At the trial, having thought over the matter further, she stated that she was quite certain that the appellant was the man. The gamekeeper, William Jones, at another period picked out the appellant and said at the trial that he had no doubt that the appellant was the man. After the appellant had been picked out he was charged, and he said again a most unfortunate answer: "Well, you have got it; it was not sold, was it?" Of course, the question was not whether they had got the motor car back, the question was whether he had stolen it. Now, on July 5 appellant was sentenced to one day's imprisonment for travelling without a ticket, and on July 6 the charge about the motor car was proceeded with and the Chief Constable warned the appellant that the Quarter Sessions would be in a very few days so that the appellant could let him know if he wanted to call any evidence. Again the appellant gave a most unfortunate reply; he said: "There are plenty of people who saw me but none of them knew me and it is no use your making any inquiries, it would be no good." In those unfortunate circumstances the appellant at the police court on July 7, instead of helping the matter further in any way, said: "I wish to reserve my defence."

1928.
17 *August.*

WILLIAM JONES.

Hewart, L.C.J., Swift, J., Branson, J.

At the trial he gave evidence and he gave evidence of an *alibi*, and in the course of that evidence he described how on June 20 at a quarter past nine he crossed by the excursion boat from Southsea to Ryde, at 10 o'clock he arrived at Ryde and walked along the front for half an hour, and then he said that about half past ten in the morning he went by the Vectis omnibus from Ryde to Cowes by way of Newport and arrived at Cowes at a quarter past twelve. He said that he had no witnesses to call because he had no time to find them. In those circumstances this Court, a fortnight ago, directed inquiries to be made and those inquiries have been made, and Superintendent Ellis of the Hampshire Constabulary has spared no effort to arrive at the truth of the matter. In the result we have had before us this morning the witness Sidney James Dibben, who is a conductor for an omnibus company, and he, upon looking at the ticket which was admittedly in the possession of the prisoner at the time of his arrest—a return ticket—is able to swear that that ticket was issued by him on the five minutes past ten omnibus from Ryde on the morning of June 20. In these circumstances counsel for the Crown very properly refrains from any attempt to support this conviction.

I may add that there are materials before the Court which go to show that another man, who is in prison for another offence, says that he was the man who stole this motor car. However that may be, it is quite evident, as the matter now stands, that this conviction cannot be supported.

It is desirable to add that this appellant has really nobody but himself to thank for the unfortunate position which has arisen; he had several opportunities of making his position plain, and unfortunately, by the kind of answer to which attention has been directed, he tended rather to confirm than to remove the suspicion which the evidence of certain witnesses had undoubtedly fastened upon him. Inquiries having been made, it is now established that this man is innocent, the *alibi* is made out, and in these circum-

stances, of course, this appeal is allowed and the conviction is quashed.

1928.
17 *August.*

WILLIAM JONES.

Conviction quashed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE, AND MR. JUSTICE HUMPHREYS.

PETER MACWILLIAM.

1928.
14 *October.*

The Scots Courts decline jurisdiction to take into account in sentence offences committed in England.

Application for extension of time for leave to appeal against sentence.

Bertram Long, for the applicant, who was not present.

The applicant was convicted at Huddersfield Borough Sessions on July 10 upon an indictment for obtaining money by false pretences and was sentenced to three years' penal servitude. In fact the offence charged was committed last year and he had been been arrested in connection with it in England. Then the police found that he was a man wanted for offences committed at an earlier date in Scotland, and he was transferred to the custody of the Scots police. He was tried in the Inverness Sheriff Court and was convicted of forgery. He had been informed by the English Chief Constable concerned in the case that if he asked the Scots Court to take into consideration his English offence in passing sentence he would not be further prosecuted for it in England. This information was given him by letter in reply to a letter of his own making inquiry on the point, and it is admitted that it was given *bona fide* by the Chief Constable, who was not aware—as appears from correspondence with the Scots Prison Commissioners—that the Scots Courts consider them-

1928.
17 *August.*

PETER MACWILLIAM

Hewart, L.C.J., Roche, J., Humphreys, J.

selves disentitled to take into consideration in passing sentence offences committed outside their jurisdiction. Hence the Sheriff refused to follow the desired course and passed a light sentence. On his release applicant was eventually rearrested and tried at Huddersfield for this offence. There were other English charges against him and these were taken into consideration at Huddersfield. It is submitted that in these circumstances a nominal sentence only, or at any rate a lesser sentence, should have been passed.

ROCHE, J.: In this case it appears that owing to the inability of Scots Courts to allow extraneous matters weight in assessing sentence, the applicant was not punished by his Scots sentence for any of the offences he had committed in England. Of these there were several, including that tried Huddersfield Borough Sessions, in resepct of which this appeal lies. Now, in England it is usual, where a prisoner consents, to deal with all offences charged against him in assessing sentence on any conviction for one of them, in order that he may leave gaol at the end of his term with "a clean sheet." But, if for some exceptional reason this course is inadvisable or impossible, the Crown is entitled to proceed with other charges excluded from consideration. In the present case the accused had committed serious offences for which he would go altogether unpunished if he had not been tried and sentenced at Huddersfield. It cannot be suggested that on the merits the sentence of three years' penal servitude was excessive. The applicant's only grievance is that he took an optimistic view of his position owing to the advice given him *bona fide* but in error by the Chief Constable. This is not a ground on which this Court can act in revising sentences.

Application dismissed.

J. H. M.

Solicitors for applicant, Messrs. T. Tickle & Co., for John Burrows, Leeds.

MICHAEL MacDONALD.

1928.
14 *October.*

MICHAEL MacDONALD.

Hewart, L.C.J., Roche, J. Humphreys, J.

Co-defendants—Summing up on case of each—Interrogation by Police—Absence of Caution—Corroboration of Accomplice by Accused's Statement.

A charge to a jury trying co-defendants must carefully distinguish between the cases of each. Whether an answer to a question by the police made without any caution to a person suspected and afterwards charged can be sufficient corroboration of an accomplice's evidence on that point against that person at the trial, *quære.*

Appeal against conviction and sentence, by leave.

Appellant was convicted on July 13 at Sheffield City Sessions on a charge of knowingly receiving stolen goods and sentenced by the Recorder to eighteen months' imprisonment with hard labour.

The facts sufficiently appear in the judgment of the Lord Chief Justice.

G. H. B. Streatfeild, for the applicant (under section 10 of the Criminal Appeal Act), who was on bail.

W. A. Macfarlane, for the Crown.

THE LORD CHIEF JUSTICE: Appellant appeals against conviction and sentence. He was tried jointly with six other defendants on an indictment containing eighteen counts covering a number of transactions from March to June, 1928, but only one of the counts which related to him was tried. That count arose out of a burglary in which goods to the value of £500 were stolen, a portion of which—namely a pink dress, a black dress, a green dress and some underclothing—were alleged to have been traced to the defendant. The trial lasted three days and in such a case it is unnecessary to point out the importance of carefully directing the jury as regards the evidence which affects each of the joint defendants. No application for a separate trial was made. Appellant was a

1928.
14 *October*.

MICHAEL MACDONALD.

Hewart, L.C.J., Roche, J. Humphreys, J.

man of good character who had never previously been accused. He was charged with receiving certain goods which had been found in the possession of another defendant, Mrs. Gazzard.

What happened was this. Mrs. Gazzard explained her possession of the three dresses and the underclothing to the police by saying that she bought them from MacDonald, who was a retail tradesman dealing in such articles. The police then visited MacDonald, roused him from sleep at 3 a.m., showed him the articles, told him that Mrs. Gazzard asserted that she had bought them from him, and asked him whether this was true. He took up the black dress, glanced at the other articles and said that he had sold them to her. He had not been cautioned before being asked this question and therefore did not know that he was suspected of stealing or receiving them. Mrs. Gazzard, at the trial, went into the witness-box and said she had bought the articles in question from MacDonald, but the latter denied that the stolen articles were those which he had sold her. All the articles were of a common type, and the pink dress alone was identified by a manufacturer's mark, but there was evidence that it, too, was of a common class of article of which the defendant would naturally sell several in the normal course of his business. Appellant at the trial said he had not examined the articles with care when he was questioned by the police and stated that the articles which he had sold to Mrs. Gazzard were similar articles to those which he had honestly obtained in the course of business, although he failed to produce precise documentary evidence by bills or invoices that he had so purchased them.

In his summing up the learned Recorder very properly told the jury that Mrs. Gazzard's evidence was that of an alleged accomplice and therefore required corroboration. But he also directed them that appellant's admission, when questioned by the police, was sufficient corroboration in law, if they were otherwise satisfied. It is obvious that grave

doubt exists whether his reply to the police, made in the circumstances mentioned and when he did not know that he was suspected of a crime, can fairly be regarded as an admission that he had sold the stolen goods to Mrs. Gazzard. Moreover he has an unblemished record and the facts as a whole are consistent with innocence. The case therefore is one of suspicion only, not proof, and the conviction cannot stand.

1928.
14 *October.*

MICHAEL MACDONALD.

Hewart, L.C.J., Roche, J., Humphreys, J.

Conviction quashed.

Solicitors for appellant, Chambers & Son, Sheffield.

J. H. M.

IRENE REES.

1928.
14 *October.*

Summing Up—Conflicting Evidence—Onus—Express Statement of the Law.

A summing-up must make it clear to the jury (especially where there is conflicting evidence) that the *onus* of proof is on the prosecution.

Appeal against conviction.

Appellant was convicted on July 18 at Glamorgan Sessions on a charge of being drunk while in charge of a motor car, under section 40 of the Criminal Justice Act, 1925, and sentenced to two months' imprisonment in the second division. She appealed against conviction on the ground of misdirection by the learned Chairman—*inter alia*—that he had nowhere directed the jury in express terms that the onus of proof lay on the prosecution.

G. D. Roberts, for the appellant, who was on bail:

It is essential in every summing up that the trial judge should make it clear to the jury, either in express terms or by necessary implication, that the *onus* of proof rests on the

1928.
14 *October.*

IRENE REES.

Hewart, L.C.J., Roche, J. Humphreys, J.

prosecution. It is admitted that the evidence here, if believed by the jury, was sufficient to support a conviction. But the learned Chairman, overlooking the possibility that a jury might think themselves entitled to convict merely because they disbelieved the witness for the defence, omitted altogether to give any such direction. This is a fatal flaw.

He cited H. J. BURTON (1922), 17 Cr. Ap. R. 5, c.q.; AMELIA HAYTON (1925), 18 Cr. Ap. R. 169, c.q.

[He was stopped by the Court.]

Morgan Evans, for the Crown:

This point has somewhat taken me by surprise and I have not examined all the cases, but I do not know any in which appellant's contention has been expressly negatived.

THE LORD CHIEF JUSTICE: Here there was a lengthy trial, lasting about two days, and numerous witnesses were called for the defence. The learned Chairman summed up very briefly, saying that he did not think it necessary to repeat matter placed before them at full length by counsel. He stated the issue clearly but omitted to direct the jury that the onus of proof rests on the prosecution, and counsel for the Crown has very candidly admitted that he himself had not thought it necessary to say so in his speech. It is, however, all important that this caution should appear, either expressly or by necessary implication, in every judicial summing up. There is therefore a fatal flaw and the verdict cannot stand.

Conviction quashed.

J. H. M.

Solicitor for appellant, J. Paige Thomas, for Evan Davies, Cardiff.

GEORGE EDWARD BOLTOLPH.

1928.
14 *October.*

GEORGE EDWARD BOLTOLPH.

Hewart, L.C.J., Roche, J., Humphreys, J.

Evidence of Previous Convictions—Statements by the Police after Verdict or Plea—Inaccuracies.

The Court will revise a sentence when after conviction or plea inaccurate statements by the police about prisoner's record may have influenced that sentence.

Appeal against a sentence of five years' penal servitude passed at Hull City Sessions on July 31, 1928, for larceny. He pleaded guilty.

Appellant in person.

THE LORD CHIEF JUSTICE: After the conviction of a prisoner it is important that police statements about his record should be accurate. In the present case two errors were unfortunately made and may have influenced the learned Recorder in passing sentence. They were afterwards discovered by the police and the prisoner was informed of his right to appeal in respect of these errors. The first misstatement was that the prisoner when on ticket of leave had left Winchester without notifying the police; this was a mistake. The second was that he had done no work since his release from gaol; this also was wrong, he had done some work for a limited company. The sentence must therefore be reduced from five to three years' penal servitude, to run from the date of conviction.

Sentence reduced.

J. H. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

1928.
29 *October.*

CYRIL ALFRED THOMPSON.

Co-prisoners—Sentence—Age.

Sentence reduced (partly) in view of a co-prisoner's shorter term.

Appeal against sentence by leave.

Appellant, who was present, was convicted at the Central Criminal Court of burglary on September 5, 1928, and sentenced by the Recorder to three years' penal servitude. Another prisoner jointly convicted with him had received a sentence of nine months' imprisonment in the second division. The appellant and that prisoner were twenty-five and twenty-one years of age respectively. The appellant had a good Army record, had worked before and after leaving the Army, and had only once before been in serious trouble. On that occasion he had been placed on probation and the probation officer had found work for him which he had accepted.

THE LORD CHIEF JUSTICE: In this case it is not quite clear why the learned Judge who sentenced appellant made so great a distinction between the cases of the two prisoners jointly indicted on this charge. Apparently he must have supposed that the elder prisoner led the younger astray, but the difference of age is not great and the inference seems dangerous. In view of the appellant's Army record, his periods of honest work, his youth, and the absence of previous serious crime, he should be given another chance before receiving a sentence of penal servitude, but this Court warns him that he must not in future expect similar leniency if he returns to a career of crime. The sentence will be reduced

to that of the other prisoner, nine months' imprisonment in the second division, and as leave to appeal was given, the sentence will run from the date of conviction.

Sentence reduced.

J. H. M.

1928.
29 *October.*

CYRIL ALFRED THOMPSON.

Hewart, L.C.J., Swift, J., Acton, J.

ERNEST MARSHALL.

1928.
29 *October.*

Habitual Criminal—Three Previous Convictions—Increase of Sentence.

Severity of sentence.

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

Appellant in person. He was convicted at Essex Sessions on October 3 of housebreaking and sentenced to three years' penal servitude; he was also convicted of being a habitual criminal and sentenced to five years' preventive detention. This was his fourth conviction as a habitual criminal.

E. A. Hawke, for the Crown, was not required by the Court to deal with the question of increasing the latter term.

THE LORD CHIEF JUSTICE: This is actually the fourth time the appellant has been convicted of being a habitual criminal. There are no merits in the appeal and the Court has had some doubt whether it ought not to increase the term of preventive detention from five years to ten. If appellant again suffers a similar conviction he must expect this course to be taken.

Appeal dismissed.

J. H. M.

EDWARD ERNEST WESTFALL.

1928.
29 *October.*

EDWARD ERNEST WESTFALL.

Hewart, L.C.J., Swift, J., Acton, J.

Indictments under section 7 of 34 & 35 Vict. c. 112—Previous Conviction alleged—Previous Conviction as Habitual Criminal alleged.

Whether in an indictment in which it is necessary to allege a previous conviction under section 7 of 34 & 35 Vict. c. 112, the fact that at the same time prisoner was convicted of being a habitual criminal should be alleged, *quære.*

The offence alleged as intended should, *semble*, be indicted substantively (*e.g.*, as an attempt).

Appeal, by leave, against conviction and sentence.

Appellant, in person.

E. A. Hawke, for the Crown:

Appellant was convicted at the County of London Sessions on September 26 of being a suspected person, and was sentenced by the Deputy Assistant Chairman to twelve months' imprisonment with hard labour. In September, 1920, he was convicted on indictment and also found to be a habitual criminal and was sentenced to three years' penal servitude and to five years' preventive detention. The present indictment under section 7 of 34 & 35 Vict. c. 112, the Prevention of Crimes Act, after alleging these convictions, charged that "he was about to commit or to aid in the commission of" an "offence or was waiting for an opportunity to commit, etc.," a felony "within seven years immediately after the expiration of the sentence" in 1920.

In the course of his judgment the LORD CHIEF JUSTICE said: It may be that there would be some ground[1] for contending that here the appellant should have been indicted for the substantive misdemeanour of attempted larceny from the person, but that point has not been raised and it does not appear to be necessary to raise it. What is said is that the

(1) Cf. *F. Dean*, 18 Cr. App. R. 133: 1924: s.r. and *H. Cadwell*, 20 Cr. App. R. 60: 1927: s.r. In *Harrison*, June 22, 1925 (unreported), the Court expressed the same view on section 7 as above.

1928.
29 *October.*

EDWARD ERNEST WESTFALL.

Hewart, L.C.J., Swift, J., Acton, J.

indictment contained a reference to the conviction of this man as a habitual criminal. The question may some day have to be determined whether an indictment under the section [7] of this statute should state a conviction as a habitual criminal, but, however that may be, that conviction, although referred to in the indictment, was not mentioned in the presence and hearing of the jury. It is quite true that another conviction was mentioned, but it was necessary, to found the allegation against the prisoner, that the other conviction should be mentioned and dealt with. . . . If it had appeared that the mention in the indictment of the previous finding that the man was a habitual criminal was referred to in the presence and hearing of the jury, other considerations would apply. Leave having been given, sentence will run from the date of conviction.

Appeal dismissed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

JOHN WILLIAM FITT.

1928.
5 *November.*

Application for Leave to Appeal against Sentence—Crown not represented—Application treated as Final Appeal—Severity of Sentence.

A previous sentence to penal servitude is not *per se* a ground for the infliction of penal servitude on a subsequent conviction (especially for an offence of a different nature).

Application for leave to appeal against sentence.

Applicant, who was not present, pleaded guilty on October 8, 1928, at the County of Durham Sessions, to warehousebreaking and larceny and was sentenced by the Chairman to three years' penal servitude.

No counsel appeared.

1928.
5 *November.*

JOHN WILLIAM FITT.

Hewart, L.C.J., Swift J., Acton, J.

THE LORD CHIEF JUSTICE: The applicant is twenty-six years old, and has been convicted on several occasions of small thefts, but so far he has never been sentenced for dishonesty to a longer term than one of three months' imprisonment. In March, 1924, he was sentenced to three years' penal servitude for rape, and it looks as if the present sentence of three years' penal servitude were related not to his offences in the nature of dishonesty, but to the fact that four years ago he was sentenced to that term. It has been said more than once by this Court that the mere fact that a prisoner has for some previous offence suffered a term of penal servitude is not in itself a reason why he should be sent to penal servitude afterwards for an offence which does not in itself merit any such sentence. In our opinion the sentence for this particular offence was excessive, and we think the proper sentence is one of twelve months' imprisonment with hard labour, which will run from the date of conviction.

Sentence reduced.

T. R. F. B.

1928.
5 *November.*

GEORGE EDWARD EMMETT.

First Conviction—Imprisonment in the Second Division.

When there is no previous conviction, imprisonment, as a rule, should be in the *second* division.

Application for leave to appeal against conviction and sentence.

Applicant was convicted, on October 8, 1928, before the Acting Deputy-Chairman, at the Buckinghamshire Sessions, of larceny of sheep, and was sentenced to six months' imprisonment.

J. N. Emery, for applicant, who was not present:

The summing-up contained a number of misdirections. Sufficient distinction between civil and criminal liability was

not made, and the case for the defence was never explained to the jury. The sentence was excessive in view of the applicant's previous good record.

1928.
5 *November.*

GEORGE EDWARD EMMETT.

Hewart, L.C.J., Swift, J., Acton, J.

The Crown was not represented by counsel.

The Lord Chief Justice: With regard to the summing-up no cause of complaint exists. The jury were directed not once, but several times, that they must be satisfied of the existence of a fraudulent intent before they convicted.

With regard to the sentence, it appears that the appellant has never been in prison, and bore a good character. The sentence may, therefore, be reduced to one of six months' imprisonment in the second division, and as the application has to that extent succeeded, the sentence may run from the date of conviction.

Sentence reduced.

Solicitors for applicant, Stooke-Vaughan & Taylor.

T. R. F. B.

DAVID GEORGE MORGAN.

1928.
5 *November.*

Previous Convictions—Long Intervals of Honest Work—Severity of Sentence.

Appeal against sentence.

Appellant pleaded guilty on October 9, 1928, at the Glamorganshire (Swansea) Sessions, to shopbreaking and larceny, and was sentenced by the Chairman to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

The Lord Chief Justice: The appellant is forty-six years of age. He was convicted in 1913 and 1914 of shopbreaking.

1928.
5 *November.*

DAVID GEORGE MORGAN.

Hewart, L.C.J., Swift, J., Acton, J.

Then for a period of ten years there was no conviction at all, and his last conviction was in October, 1926, when he was sentenced to six months' imprisonment for housebreaking. It appears from his record that he has worked hard at times, and indeed that for most of the time since he was released from his last sentence he has been engaged in honest work. In all the circumstances we think that the sentence should be reduced to one of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

1928.
5 *November.*

WILLIAM ROBERT LEACH.

Obtaining by False Pretences—Falsity Alleged of the Essence of the Crime.

On an indictment for obtaining by false pretences the falsity alleged must be proved.

Appeal against conviction.

Appellant was convicted, on October 8, 1928, before the Chairman at the County of Durham Sessions, of obtaining money by false pretences, and was sentenced to six months' imprisonment in the second division.

R. H. Turton, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present.

The conviction was unsatisfactory in a number of respects. In the first place, the prosecution never proved the falsity of the alleged false pretence.

[He was stopped.]

W. A. Macfarlane, for the Crown:

The conviction in this case cannot be supported.

THE LORD CHIEF JUSTICE: The prosecution appears to have failed here on the threshold. One thing must be shown

on an indictment for false pretences, namely, that the alleged pretence was false, and, so far as we can see, the prosecution never began to perform that task. As counsel for the Crown agrees, it is impossible to support this conviction, and it must be quashed.

1928.
5 *November.*

WILLIAM ROBERT LEACH.

Hewart, L.C.J., Swift, J., Acton, J.

Conviction quashed.

T. R. F. B.

RONALD JAMES LAWS.

1928.
5 *November.*

Indecent Assault—The Criminal Law Amendment Act, 1922, 12 & 13 *Geo.* 5, *c.* 56, *s.* 2—*Defence of Belief about Age of Female—Carnal Knowledge.*

The Court disapproves the defence open under section 2 of 12 & 13 Geo. 5, c. 56, to a charge of carnal knowledge, not being open on that of indecent assault.

Appeal against sentence, by leave.

Appellant pleaded guilty, on October 15, 1928, at the Cambridgeshire Assizes, to indecent assault upon a girl under sixteen years of age, and was sentenced by Avory, J., to four months' imprisonment as a young offender.

Aiken Watson, for appellant, who was present:

Appellant is seventeen years of age, and has hitherto borne a good character. He was originally charged also with carnal knowledge of the same girl, and would have relied on the defence that he had reasonable ground for believing the girl to be over sixteen had that charge stood alone, but the Criminal Law Amendment Act, 1922, does not leave that defence open in regard to a charge of indecent assault.

The Crown was not represented by counsel.

THE LORD CHIEF JUSTICE: The appellant was charged, upon an indictment containing four counts, with carnal knowledge of a girl under sixteen years of age, and also with indecent assault upon the same girl. On being advised, he decided to

1928.
5 *November.*

RONALD JAMES LAWS.

Hewart, L.C.J., Swift, J., Acton, J.

plead guilty to the counts alleging indecent assault, and was sentenced to four months' imprisonment in the division for young offenders. He now appeals, by leave, against that sentence.

The girl, at the time of the offence, was aged fifteen years and nine months and the appellant is about a year older. It was realised that, as the appellant is under twenty-three years of age, the defence, which is left open by section 2 of the Criminal Law Amendment Act, 1922, that he had reasonable cause to believe the girl was over sixteen, would apply to the counts which alleged carnal knowledge, but that it would not apply to the counts for indecent assault. There is apparently an oversight in the statute, to which attention has from time to time been directed in vain. Mr. Justice Avory, in passing sentence, said: "The law as it at present stands afforded you apparently a good defence to the charge of having had carnal knowledge of this girl, but it afforded you no defence to the charge of having indecently assaulted her. Some day, I hope, somebody will have the sense to remedy this state of things." It is, indeed, a grotesque state of affairs that the law offers a defence upon the major charge, but excludes that defence if the minor charge is preferred. No more need be said. This Court can only reiterate the hope, if hope be the correct word, which Mr. Justice Avory expressed when he was passing sentence. This Court cannot alter the statute, but it can revise the sentence, and it will do so by reducing it to a sentence of one day's imprisonment.

Sentence reduced.

Solicitors for appellant, Rider, Heaton, Meredith & Mills, for J. R. Dawbarn, Wisbech.

T. R. F. B.

The Court (the Lord Chief Justice, Swift and Acton, JJ.) also sat on November 9.

WILLIAM BERRY.

1928.
12 *November.*

WILLIAM BERRY.

Hewart, L.C.J., Avory, J., Acton, J.

Fraud — Many previous convictions — Sentence — Value of property obtained.

In determining sentence for fraud regard must be had to the value of the things obtained, although prisoner has been often previously convicted of similar offences.

Appeal against sentence.

Appellant, who was not present, pleaded guilty at the Ludlow Borough Quarter Sessions on October 11 to obtaining food to the value of three shillings by false pretences and was sentenced to five years' penal servitude.

There were sixteen previous convictions against appellant, who was forty-two years old; after a number of short terms he was three times sentenced to penal servitude—once for three years for obtaining by false pretences—the last occasion being in 1925; he was released on licence on March 5 last.

The present sentence took into account twenty-eight untried charges for fraud and ten for larceny, the total value of the proceeds of these offences being about £28. It appeared, however, that he had worked, with a good record, for five weeks and had lost his employment through no fault of his own; moreover, he had been in custody awaiting trial for more than three months.

In view of the mitigating circumstances, the Court reduced the sentence to eighteen months' imprisonment with hard labour, to run from the date of conviction (leave to appeal having been given).

Sentence reduced.

T. R. F. B.

1928.
12 *November*.

WILLIAM RICHARD HALL.

WILLIAM RICHARD HALL.

Hewart, L.C.J., Avory, J., Acton, J.

Murder—Provocation—Defence of Manslaughter set up—Interval—Weapon Used—Duty of the Judge.

If in a trial for murder the defence of manslaughter is raised the Judge ought not to ignore that defence in his charge to the jury.

The rule on provocation in S. G. HAYWARD, 6 C. & P. 157 accepted.

Application for leave to appeal against conviction.

Applicant was convicted on October 18, 1928, before Mr. Justice Mackinnon at Buckinghamshire Assizes, of murder, and was sentenced to death.

The application was treated as a final appeal.

W. A. Fearnley-Whittingstall, for the applicant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Applicant was convicted of the murder of one Belcher Sines by stabbing him with a knife. Some little time before the blow there had been, according to the evidence for the prosecution, a fight between the applicant and a brother of the deceased man, and, according to the evidence for the defence, an assault and attack upon the applicant by several persons in concert. The judge told the jury that their verdict must be either one of Murder or Not Guilty. He failed to direct them that there was a third possibility, namely, a verdict of manslaughter. Where there is evidence of manslaughter, that defence must be left to the jury.

HOWARD BALL (1924), 18 Cr. Ap. R. 149: *verdict of manslaughter substituted, sentence varied.*

CATHERINE THORPE, [1925] W. N. 217; 133 L. T. 95; 89 J. P. 143; 41 T. L. R. 468; 69 S. J. 525; 28 Cox, C. C. 4; 18 Cr. Ap. R. 189.

That rule applies, even when that defence has not been raised; but here it was raised and pressed, although it was

1928.
12 *November.*

WILLIAM RICHARD HALL.

Hewart, L.C.J., Avory, J., Acton, J.

not the main line of defence. There was certainly evidence of provocation and the fact that some interval of time elapsed between the provocation and the blow struck by the applicant did not necessarily prevent the defence of manslaughter succeeding: HAYWARD (1833), 6 C. & P. 157. Further, there was conflicting evidence in regard to the events before the stabbing, and in regard to the interval of time which elapsed between the attack upon the applicant and the stabbing. The learned judge appears to have taken the view that there could not be provocation sufficient to reduce the crime to manslaughter on the assumption that in both these matters the story told by the witnesses for the prosecution must necessarily be the true one.

Leslie Marks, for the Crown:

The judge was not bound to leave the defence of manslaughter to the jury, unless he thought that there was evidence for the jury capable of reducing the crime from murder to manslaughter. Here, in view of the lapse of a substantial interval of time between the provocation and the blow, he may well have taken the view that the defence of manslaughter was impossible.

THE LORD CHIEF JUSTICE[2]: This appellant, William Richard Hall, was convicted at the Buckinghamshire Assizes of the murder of a man named Belcher Sines. He was sentenced to death, and now appeals against conviction. The case for the Crown was that a few minutes after half-past ten at night on Saturday, the 19th of May, the appellant and Mark Sines had a fair fight, that some fifteen or twenty minutes afterwards, as Mark Sines was passing the appellant's house, the appellant came out and ran after him, but did not catch him, that the appellant then met a brother of Mark Sines named Shipton Sines and stabbed him, and then went back

(2) This judgment is a *verbatim* transcript of a copy supplied by the courtesy of the Director of Public Prosecutions.

1928.
12 *November.*

WILLIAM RICHARD HALL.

Hewart, L.C.J., Avory, J., Acton, J.

towards his home, and that outside the door the appellant met Belcher Sines, and inflicted wounds upon him from which, shortly afterwards, he died. The appellant's case on the other hand was that the fight was not a fair fight, but that he was in fact attacked by a crowd, that he was kicked in the head, and put into such a state of mind and body as not to be able to have any knowledge of what he was doing or saying afterwards. His evidence was that he did not remember anything after the blows until some time later, when he found himself in hospital. He has said that these men were following him up on the opposite side of the road, and that one of them shouted to him, and that he could not stand that, and he turned back and got off his coat, and went across to them with the intention of fighting, but never had a chance to fight. He said: "I was knocked down and I was on my hands and knees trying to get up, and I never had a chance to get up. The last thing I remember was holding a man's boot away from me."

Now the appellant is a labourer some 36 years of age, and he has lived in Colnbrook with his wife and children for some years. The police have nothing against his character. The man now dead, Belcher Sines, was a man 33 years of age, who lived with a man called Thomas Brazil in a caravan in a field, and his brothers, Mark and Shipton, lived also in a caravan in the same field, and they had lived there for some six or seven years. They were described as farm labourers, and they also had not given the police any trouble. Apparently some nine months ago the appellant had accused Mark Sines of cheating at darts; they had quarrelled and they fought, and afterwards, as it seemed, they were friendly. But on Saturday, the 19th of May, in the afternoon, when Mark Sines had been in a public house at Colnbrook and went across to another public house, he found the appellant there, and the appellant took the opportunity of saying to Mark Sines: "Come on, you hit me once," and kicked at him, and Mark Sines said: "I will see you to-night." According to a

witness named Lawrence, Mark Sines said: "I will hunt you out to-night." The appellant replied: "Several of you. Not man to man."

1928.
12 *November.*
WILLIAM RICHARD HALL.
Hewart, L.C.J., Avory, J., Acton, J.

That night, some of the witnesses went at 10 o'clock from one public house to another, and in that second public house found the appellant; and Mark Sines said to him: "What did you kick me for to-day?" And the appellant said: "I did not." Mark Sines replied: "You are a liar. You cannot fight fair; you can only kick." Then Mark Sines said: "We" —that is he and the appellant—"will have it out fair when we get outside." There is some corroboration about that conversation. At or shortly after half-past ten, they all went out, and according to the case for the prosecution—differing fundamentally in this respect from the case for the defence—when they got to the county bridge Mark Sines and the appellant had a fight. According to Mark Sines it was a fair fist fight, and it was soon over, but in the course of it he said that he knocked the appellant down twice, and then he said that the appellant said that he had had enough, and walked away. Shipton Sines said that he did not see any foul blow. One witness said it was a fair fight. A witness named Ford, who was on his way home from another public house, saw a group of men on the bridge, the appellant was lying on his back, and Ford went and helped him, and he saw that he had blood on his face; and Ford asked the appellant if he was all right, and he said: "I am quite all right," and in the opinion of Ford he appeared to be a little bit dazed.

After that had taken place on the bridge which did take place, whether it was a fight, as the witnesses for the prosecution said, or whether the appellant was attacked, as he said, the appellant went to the Square about one hundred yards further on, and his mouth was bleeding. Belcher, Shipton, and Mark Sines also went to the Square, and they remained a few minutes, and then the crowd began to disperse. A police officer who was there said that that was about seventeen minutes to eleven. Mark Sines walked home, and they had

1928.
12 *November.*

WILLIAM RICHARD HALL.

Hewart, L.C.J., Avory, J., Acton, J.

to walk along the street where the appellant lived, and when they got to the appellant's house, which was about one hundred yards from the Square, the appellant came out, according to Mark Sines, and said "I have got you," and Mark Sines and Brazil ran away and the appellant ran after them, but did not catch them. Meantime, Shipton Sines had gone down Mill Street, and he had passed the appellant's house and turned to go to the caravan, and the appellant saw him and jumped out on him, he said, and indeed stabbed him in the arm and in the left side. Mark Sines and Brazil heard those cries, went back and found Shipton Sines wounded, and having blood on his shirt. He was taken along the street towards the Square to see a doctor. Meantime another witness, a man named White, who had spent the evening in his house nearly opposite to the appellant's house, said that just before 11 o'clock he heard a man shout "I am stabbed," and he went to his door and saw the appellant going into his front door. He saw a form lying in the road nearly opposite the appellant's house. He saw Mark Sines and Brazil coming along the street supporting Shipton Sines. There was no one else in the road, and so White ran and fetched a police officer. When the police officer arrived he found Shipton staggering about the street, and near him was Belcher Sines lying on his back in the street some five yards from the appellant's house. A doctor came and he found that Belcher Sines had a cut in the left side of the abdomen, and he found that Shipton Sines had a cut in the left side. The officer went into the appellant's house, and found him sitting in the back kitchen. His lip, he said, was cut and bleeding, and his face was bruised. Then the doctor went to the appellant's house, and the doctor's evidence was that the appellant's face was generally bruised, and from the right side of the nose down to the left side of the mouth there was a deep cut, and the cut exposed the gum and teeth, and one of the teeth had been broken. The doctor said that the appellant was a little bit incoherent and excited. In the opinion of that doctor the appellant had been

hit by something other than a fist. He said: "It is hard to believe that that wound was caused by a bare fist." Afterwards he said that the appellant said that what he had done he had done in self defence.

That is, in outline, the most important part of the evidence in the case, and the learned judge was of opinion that the only issue for the jury was the issue: murder or acquittal. It is now made clear to us that another defence, at least another defence, was indicated, and to some extent at any rate developed, in the course of the trial, the defence, namely, that at the time when this act of killing was committed, the appellant was labouring under strong provocation and that the offence ought to be reduced from one of murder to one of manslaughter.

Now undoubtedly there were grave difficulties in the way of that defence, and not the least difficulty was the strong contrast between the evidence for the prosecution and the evidence for the defence about what took place upon the bridge, and the appellant's story of what took place upon the bridge depended upon his testimony alone, subject to this however, that the gravity of the injuries which he had received was admitted by the medical witnesses called for the prosecution. But another and more serious difficulty in the way of the defence was the interval which had elapsed between the acts which were said to have given the provocation, and the act with which the appellant was charged. The learned judge, in the circumstances, was of the opinion that there was no evidence to go to the jury on the question of provocation. It may well be that that was because, as the case appeared to him, the provocation had come from one man, and another man had been killed.

The question for us is whether upon this evidence the defence of manslaughter ought to have been left to the jury. No doubt if the preliminary question of fact: Is the version of the prosecution correct or is the version of the appellant correct? was decided in favour of the prosecution,

1928.
12 *November.*

WILLIAM RICHARD HALL.

Hewart, L.C.J., Avory, J., Acton, J.

the defence of provocation became difficult indeed; but it appears to us that it was necessary that the jury should decide, upon that conflict of testimony, what it was that had happened, and in like manner with regard to the interval of time which had elapsed between the incidents on the bridge and the stabbing of Belcher Sines. It was, as we think, for the jury to consider whether in those circumstances provocation could be said to have continued. As was said by Chief Justice Tindal in the case of THE KING *v.* G. HAYWARD, which is reported in 6 Carrington and Payne, page 157 [1833], at page 159, speaking to the jury with reference to the facts of that case: "The remaining and principal question for their consideration would be whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding"; and in the course of that summing up one finds these words: "It would be for them to say, whether the prisoner had shewn thought, contrivance, and design, in the mode of possessing himself of this weapon and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion."

So here, it seems to us that it was for the jury to consider first of all what the true version of the facts was, and secondly to consider as precisely as the evidence permitted, what was the interval that had elapsed, and thirdly to consider, when they had made up their minds upon those questions, whether it was true to say in this case that the prisoner, when he committed the act with which he was charged, was smarting under a provocation so recent and so strong that he was not, at the critical moment, the master of his own understanding. Unfortunately, however, that defence was never submitted to the jury. There is no reference to manslaughter in the summing up, and the only question left to the jury was whether the prisoner was guilty of murder or not.

1928.
12 *November.*

WILLIAM RICHARD HALL.

Hewart, L.C.J., Avory, J., Acton, J.

In our opinion it was right in this case, upon the evidence, to leave to the jury the question whether the true verdict was a verdict of manslaughter, among other questions. As that course was not taken, a difficult question arises as to what is now to be done.

Nobody can consider this evidence without perceiving that the defence of manslaughter was beset by great difficulties, difficulties arising in particular from the interval which had elapsed, from the weapon that was chosen, and from some at least of the statements which the appellant afterwards made. But however great those difficulties were, it seems impossible to say that if the defence of manslaughter had been left to the jury they would nevertheless certainly have found a verdict of wilful murder.

In those circumstances we have come to the conclusion, after a good deal of deliberation, that the proper course here is to quash this conviction and to substitute the verdict of manslaughter, to convict this appellant of the crime of manslaughter; and it is obvious that he must undergo a very serious punishment for this grave offence, and we think that the proper sentence upon him is a sentence of ten years' penal servitude. The conviction is accordingly altered and that sentence is passed.

Conviction of murder quashed: Sentence varied.

T. R. F. B.

1928.
19-20 *Nov.*

Hewart, L.C.J., Avory, J., Acton, J.

CHUNG YI MIAO.

Appellant's Statement to the Court—Position of Counsel.

The Court will not permit an appellant, who is represented by counsel, to state his case.

Application for leave to appeal against conviction.

Applicant was convicted on October 24 at the Carlisle Assizes of the murder of his wife and sentenced to death, by Humphreys, J.

Jackson, K.C., and *W. Gorman*, for the applicant, who was present.

Singleton, K.C., and *Maxwell-Fyfe*, for the Crown.

Jackson, K.C., informed the Court that applicant insisted on making a statement to them: in those circumstances would they hear counsel as well?

THE LORD CHIEF JUSTICE: This is a very unusual position. Is the applicant represented by counsel or not?

Jackson asked leave to confer with his client privately, and after doing so with his junior, announced that they withdrew from the case.

THE LORD CHIEF JUSTICE: If, at the conclusion of the applicant's statement, any question of law, on which you desire to be heard, should arise, you may address the Court as *amicus curiae*.

Applicant, in person, asked leave to call three new witnesses.

They were called and examined by him; one was cross-examined by *Singleton*. They deposed that other Orientals were seen near the scene of the crime on the day it took place.

Applicant addressed the Court at length.

1928.
19-20 *Nov.*

CHUNG YI MIAO.

Hewart, L.C.J., Avory, J., Acton, J.

Jackson, K.C., at the invitation of the Court, said that no point of law arose other than those of misdirection and non-direction, with which applicant had dealt.

Singleton, K.C., replied.

Applicant, by leave, made some further observations.

The Court, remarking that special indulgence had been shown to the applicant as he was a foreigner, dismissed the application.

Application dismissed.

Solicitor for applicant, H. Darnton Judson, Manchester.

I. G. K.

THOMAS BURNS.

1928.
19 *November.*

THOMAS BURNS.

Hewart, L.C.J., Avory, J., Acton, J.

Insanity certified after conviction and before appeal heard—Adjournment sine die.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at the Gloucester Assizes on October 29 of assault with intent to ravish, and was sentenced by Talbot, J., to twenty-one months' imprisonment with hard labour.

After the trial the prison doctor thought that applicant was insane, and since his conviction he had been so certified under the Criminal Lunatics Act, 1884, and removed under a Home Office Order to an asylum. The Court, therefore, adjourned the hearing of this application *sine die*.

Application adjourned sine die.

I. G. K.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ACTON.

1928.
26 *November.*

GEORGE COULTHURST.

GEORGE COULTHURST.

Hewart, L.C.J., Avory, J., Acton, J.

Many Previous Convictions—Periods of Honest Work—Severity of Sentence.

Appeal against sentence.

Appellant, who was present, pleaded guilty at Hampshire Quarter Sessions on October 16, 1928, to obtaining £5 by false pretences, and was sentenced by the Chairman to three years' penal servitude.

No counsel appeared.

THE LORD CHIEF JUSTICE: In addition to the charge to which the appellant pleaded guilty at the trial, four other offences of obtaining sums of money by false pretences from four different persons were taken into consideration. The sums in all amounted to £25 10s. It appears that the appellant has been convicted thirteen times, usually for small offences, though he was in 1916 sentenced to eighteen months' imprisonment with hard labour. It is fair to say, however, that he has from time to time done honest work in various employments. This fact was not made sufficiently clear in the Court below. Looking at the whole of the facts, and not least at the efforts made by the appellant to earn an honest living, we think this is not a case for penal servitude, and we reduce the sentence to one of fifteen months' hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

WILLIAM JONES.

1928.
26 *November.*

WILLIAM JONES.

Hewart, L.C.J., Avory, J., Acton, J.

33 & 34 *Vict. c.* 23, *s.* 4, *the Forfeiture Act*, 1870—*Order on Prisoner convicted of felony to pay sum "by way of satisfaction or compensation"—Orally made "immediately after conviction"—Recorded later—Appeal to Court of Criminal Appeal—7 Edw.* 7, *c.* 23, *s.* 21—*Voluntary order to pay by prisoner—Countermand—Estoppel.*

An appeal lies to the Court from an order on a prisoner convicted of felony to pay a sum "by way of satisfaction or compensation" to "any person aggrieved," under section 4 of 33 & 34 Vict c. 23, the Forfeiture Act, 1873, by virtue of section 21 of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), the sum in question being included in "the expression 'sentence.'"

Such order made orally at the time of sentence, though not recorded till a later date, is "immediately after . . . conviction" within section 4 (above).

If such a prisoner has voluntarily authorised the payment of money on the above behalf he cannot, *semble*, after such order, countermand his own authority.

Appeal against order for compensation.

Appellant was convicted, before Commissioner Atherley-Jones at the Central Criminal Court on July 10, 1928, of uttering a cheque, knowing the indorsement to be forged, and was sentenced to eighteen months' imprisonment with hard labour and was further ordered to pay to the prosecutor £90 by way of compensation, under section 4 of 33 & 34 Vict. c. 23, the Forfeiture Act, 1870—"upon the application of" the "person aggrieved."

Gerald Howard, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant was sentenced on July 10. On September 7 the order appealed against was made. On October 15 appellant appeared at the Central Criminal Court to make an objection to the order. The learned Judge further considered the matter, and on October 19 appellant was again brought up, and the Judge told him that he could not alter his decision. It is submitted that the order was invalid on two grounds:

1928.
26 *November.*

WILLIAM JONES.

Hewart, L.J.C.
Avory, J.,
Acton, J.

first, because it was not made "immediately after the conviction," and secondly, because it was made without notice being served upon the appellant, and in his absence.

W. B. Frampton, for the Crown:

The order was in fact made by the learned Judge immediately after conviction, but was not then and there recorded, because the prisoner had at that time himself given an order to his Bank to pay the sum in question, which he subsequently countermanded. The prosecution do not seek to rely on the point that no appeal lies against an order of this kind.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Central Criminal Court of uttering a cheque for £275, knowing the indorsement to be forged. He was sentenced to eighteen months' imprisonment with hard labour. He afterwards applied to this Court for leave to appeal against conviction and sentence, and on July 31 this Court refused that application. The appellant now appeals against an order for an award made under section 4 of the Forfeiture Act, 1870, by which he was ordered to make a payment by way of "satisfaction or compensation."

Two points are taken on his behalf. In the first place, it is said that the order which is appealed against was not made "immediately after" his conviction; and, secondly, that the order was made in his absence and without notice being given to him. A preliminary question has arisen whether there is a right of appeal with reference to an order of this kind, but counsel for the prosecution has not thought fit to argue that no such right exists.

It may be useful here briefly to recapitulate the facts. After the appellant had been convicted—the conviction being on July 10 at a sessions of the Central Criminal Court which opened on June 26—a police officer gave evidence with regard to the appellant's character, and said, among other matters, "The prisoner certainly did give me every assistance in this

1928.
26 *November.*

WILLIAM JONES.

Hewart, L.C.J., Avory, J., Acton, J.

case and wanted to make restitution of the money in his hands. He gave me a written authority, but the Bank would not act on it." We are told, and it is common ground, that a written authority of that kind was in fact given by the appellant to the police. After the appellant had been sentenced on that day, counsel for the prosecution immediately applied to the Court in these terms: "I ask your Lordship to authorise the cheque for £90. . . ." The learned Judge, who by this time had been made aware of the information given by the police, interposed and said: "It is not necessary, but I will do so." We are told by counsel that, at the time when these observations were made, the appellant was still in the dock. He afterwards repented of the authority which he had given and sought to countermand the order to the Bank, and it appears that although the learned Judge had said what I have just read on July 10, no order was in fact drawn up. A further application was made on September 7, and the learned Judge, who had heard the case, said to the counsel who then made the application: "Now you ask me to make the order which I have already made and which was never properly recorded as an order because it was deemed, and apparently with good reason, to be an unnecessary order. Now it turns out not to be an unnecessary order." In other passages in the transcript, the account given of the matter is not always the same, but more than once the learned Judge says that he did make the order and, in our opinion, the fair view is that it was made on July 10, but was not presently recorded for the reason that everyone in Court was then aware of the statement by the police officer that the appellant had himself given authority to repay. The conclusion seems to be that the order, which was afterwards recorded, was in fact made immediately after conviction, and the requirements of that part of the section appear to have been fulfilled. The language of section 4 of the Forfeiture Act, 1870, is as follows: "It shall be lawful for any . . . Court [by which judgment shall be pronounced or recorded, upon the convic-

1928.
26 *November.*

WILLIAM JONES.

Hewart, L.C.J., Avory, J., Acton, J.

tion of any person for . . . felony] . . . if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding one hundred pounds, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony. . .''

On the true interpretation of what was said and done, it does not appear that this order was not made "immediately after the conviction,'' and, in any case, this appellant appears to us to be estopped from contending that the order was not made "immediately after the conviction.'' The order was orally made and the fact that it was not recorded was due to conduct on his part from which he afterwards endeavoured to recede, and that statement of facts is an answer also to the contention that what was done was done behind the back of the appellant and without notice being given to him.

The question whether such an order is the subject of an appeal to this Court was not fully argued, because counsel for the prosecution was not disposed to press the point that no appeal lay. It seems to us that there may be more than one ground on which it can be said that such an appeal does lie, but it is sufficient now to mention one ground only. Section 4 of the Forfeiture Act, 1870, continues: "**. . .** The amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs [of the prosecution] ordered by the Court to be paid under the last preceding section of the Act.'' The sum of money is, therefore, payable as a judgment debt due to the person entitled to recover from the person so convicted. When one turns to the Criminal Appeal Act, 1907, s. 21, which is the section containing definitions, runs: "The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted or his wife or children.'' In the opinion

1928.
26 *November.*

WILLIAM JONES.

Hewart, L.C.J., Avory, J., Acton, J.

of the Court, the words "order made on conviction with reference to the person convicted" are sufficiently wide to include an order made under section 4 of the Forfeiture Act, 1870, for payment of money by way of "satisfaction or compensation," such amount awarded being deemed to be a judgment debt due from the person so convicted. In the result, therefore, we are of opinion that there is a right of appeal as being an appeal against sentence in such a case as this, but that this appeal fails on both grounds urged in support of it, and the appeal is accordingly dismissed.

Appeal dismissed.

Solicitors for the prosecution, Neve, Beck & Crane.

T. R. F. B.

The Court (the Lord Chief Justice, Swift and Hawke, JJ.) also sat on December 3.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE HAWKE.

GEORGE TAVENER AND GEORGE VICTOR TOBITT.

1928.
10 *December.*

Identification Doubtful—Mis-statement in Summing-up.

A mistake in summing-up about a witness's evidence, directly affecting the issue, may be a ground for quashing a conviction.

Appeals against conviction and sentence by leave of the Court.

Appellants were convicted at East Kent Quarter Sessions on October 16, 1928, of shopbreaking and housebreaking, and

1928.
10 *December.*

GEORGE TAVENER and GEORGE VICTOR TOBITT.

Hewart, L.C.J., Swift, J., Hawke, J.

were each sentenced, the former to eighteen months' and the latter to twelve months' imprisonment with hard labour.

R. S. Chapman, for both appellants (under section 10 of the Criminal Appeal Act, 1907), who were present:

The evidence of identification was only slight, and was inaccurately referred to in the summing-up. [He was stopped.]

H. W. Wightwick, for the Crown:

It is true to say that the Chairman did refer to the evidence of the identifying witness in a way that cannot be justified, but there was evidence apart from this, and the mistake in the summing-up did not affect Tavener.

THE LORD CHIEF JUSTICE: We have come to the conclusion that in various ways the trial was unsatisfactory. The evidence against the appellants was slight in more than one respect; and further, there was an unfortunate remark in the summing-up, where it was said that a witness stated that on the particular night he saw "these two men." What the witness had said was that he saw two men, one of whom he recognised as Tavener, while the other resembled Tobitt, but he could not be sure about the latter. That was the only evidence of identification. It may well be that the case was one of grave suspicion, and that if all the facts had been known, both men ought to have been convicted. But, on a fair estimate of the evidence as given, we have reluctantly come to the conclusion that the trial was unsatisfactory. Both appeals must be allowed, and both convictions quashed.

Convictions quashed.

T. R. F. B.

HENRY WILLIAM MARCK.

Obtaining by False Pretences—Intent to Defraud.

1928.
10 *December.*

HENRY WILLIAM MARCK.

Hewart, L.C.J., Swift, J., Hawke, J.

On an indictment for obtaining by false pretences, the jury must be charged that intent to defraud is of the essence of the offence.

Appeal against conviction by leave of the Court.

Appellant was convicted at Gloucestershire Sessions on October 18, 1928, of obtaining money by false pretences, and was sentenced by the Chairman to twelve months' imprisonment with hard labour and two years' police supervision.

O. L. Bateson, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

It was never explained to the jury that the intent to defraud is an essential ingredient of this offence. [He was stopped.]

W. M. Andrew, for the Crown:

There does not appear to be any passage in the summing-up where the jury were explicitly told that they must be satisfied of the intent to defraud, before they could convict, but there are several passages from which, it is submitted, the jury must have inferred the necessity of such proof.

THE LORD CHIEF JUSTICE: There are some other features in this case which might deserve attention, but it is enough to deal with one. It is quite clear that, from the beginning to the end of the summing-up the jury were never told that intent to defraud is an essential ingredient of the offence with which the appellant was charged. That omission, as has again and again been pointed out by this Court, is fatal. The appeal must be allowed and the conviction quashed.

Conviction quashed.

T. R. F. B.

1928.
10 *December.*

GEORGE JOHNSON.

GEORGE JOHNSON.

Hewart, L.C.J., Swift, J., Hawke, J.

Prisoners jointly Indicted—Judge's view that the case against one is not clear though suspicious.

If a Judge has distinctly reached the conclusion that the case against a defendant is merely one of suspicion, he ought to withdraw it from the jury.

Appeal against conviction.

Appellant was convicted at the County of London Sessions on November 6, 1928, of receiving stolen goods, and was sentenced by the Deputy-Chairman to twelve months' imprisonment with hard labour.

C. Gallop, for appellant, who was present:

Appellant at the time of his arrest was in the company of another man, who was carrying in an attaché case a stolen fur coat, and who was charged together with appellant. The Deputy-Chairman overruled counsel's submission that there was no case but told the jury that there was nothing more than suspicion against the appellant, and that the case against him had not been made out with that clearness which the law requires, and that he would proceed, on the assumption that the jury would accept that view, to deal with the case against the other prisoner in his summing-up. It is submitted that he should have directed the jury to acquit the appellant.

L. A. Byrne, for the Crown:

In spite of the Deputy-Chairman's favourable summing-up, there was evidence on which the jury could, if they chose, convict the appellant.

THE LORD CHIEF JUSTICE: In our opinion, once the Deputy-Chairman had reached the conclusion that there was no real evidence upon which the appellant could be convicted, the proper course for him was not to leave the case in the jury's hands, but to withdraw it from them. The appeal must be allowed, and the conviction quashed.

Conviction quashed.

Solicitors—W. R. Bennett & Co., for appellant.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ACTON.

GEORGE POWELL.

1928.
17 *December.*

Co-prisoners—Difference of Antecedents.

On conviction on a joint indictment there should be a discrimination in sentence in favour of those not previously convicted.

Appeal against sentence, by leave of the Court.

Appellant was convicted at Guildford Borough Sessions on October 27, 1928, of housebreaking, and was sentenced by the Recorder to eighteen months' imprisonment with hard labour.

G. St. J. Macdonald, for appellant, who was present: Appellant has never been convicted of any offence.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted of housebreaking along with his two brothers, and all were sentenced to eighteen months' imprisonment with hard labour. It appears to us that it would have been right to draw a distinction between the appellant, who had never been convicted at all, and his brothers, each of whom had been twice previously convicted. In these circumstances, we think that the sentence passed upon the appellant may be reduced to a sentence of nine months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

Solicitor—Bruce Searle, for appellant.

1928.
17 *December.*

FLORENCE CLUE.

FLORENCE CLUE.

Hewart, L.C.J., Avory, J., Acton, J.

Fresh Evidence.

The Court will revise a sentence in a case where relevant facts were not given in evidence at the trial.

Appeal against sentence.

Appellant pleaded guilty, on November 22, 1928, at York Assizes, to bigamy and was sentenced by Roche, J., to six months' imprisonment.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant gave evidence at the Assizes that her husband had left her early in 1926 to look for work, and had not lived with her since. From that time she has supported two children of the marriage, and also a child of the bigamous union. She has informed this Court that in October, 1926, a short time before she went through the bigamous ceremony, she received a letter stating that no doubt she would like to hear that her husband was dead. That letter has not been produced, but she has told this Court that she believed that statement, and that it was only after she had gone through the bigamous ceremony that she found that it was not true, and that her husband was alive. These facts were not disclosed at the trial.

The appellant is twenty-eight years of age, and has not been previously convicted. Looking at all the facts of the case, and not least at those which were not before the Court below, we think that the sentence may fairly be revised and a sentence of twenty-six days' imprisonment, to run from the first day of the York Assizes, substituted. That means that the appellant may be discharged at once.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

CHARLES ROBERTS.

1929.
11 *January.*

Conviction in One Session, Sentence in Another—Sentence Postponed.

Sentence generally runs from the date of the first sitting of the court of trial, at whatever date it may be passed.

Appeal against sentence.

Appellant was convicted at the Central Criminal Court on September 4, 1928, of uttering a forged cheque and was sentenced by the Recorder on November 20 to three years' penal servitude and five years' preventive detention. He had been put back for sentence to a later session, in order that he might be called as a witness for the Crown in another case. That session began on November 4 and the trial took place on November 11. He now contended, in person, that sentence should run from the first day of the session at which he was convicted, *viz.*, September 4, and not from that of the later session.

P. Clarke, for the Crown, agreed.

The Court took this view.

Sentence reduced.

H. C.

1929.
11 *January.*

ARTHUR WALLACE.

Hewart, L.C.J., Avory, J., Shearman, J.

ARTHUR WALLACE.

Habitual Criminal—Confession of Allegation by Convict previously so Found — Mistaken Belief About Period covered by the Allegation.

A plea of guilty on the allegation of being a habitual criminal should not be accepted until its meaning has been explained to the prisoner.

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

Appellant pleaded guilty at the Central Criminal Court on November 11, 1928, to housebreaking and was convicted (as it was supposed, on his own confession) of being a habitual criminal and was sentenced by the Recorder to three years' penal servitude and five years' preventive detention.

He now, in person, amplified his ground of appeal, *viz.*, that he had pleaded guilty to the allegation of being a habitual criminal so found in a previous trial (1910) and had not intended to admit that he was one on November 11, 1928.

Frederick Levy, for the Crown:

Appellant had been so found in 1910. In JOSEPH DONOVAN, 19 Cr. App. R. 2, 1925, the Lord Chief Justice said: "One thing must be added. The appellant admitted that he was a habitual criminal. He was not so found by a jury. He seems to have had no little experience of habitual criminality, but it is right that before a Court accepts a plea of guilty to such a charge the essence of that charge —namely, that the prisoner *at that time is* (not that at some other time he might have been regarded as) a habitual criminal—should be explained to him. In the present case the appellant might most properly have made the same admission if the explanation had been given to him, and it

1929.
11 *January.*

ARTHUR WALLACE.

Hewart, L.C.J., Avory, J., Shearman, J.

is not possible, therefore, to say that the sentence of preventive detention ought not to have been passed on him." Appeal dismissed. That is very much this case.

THE LORD CHIEF JUSTICE: This Court has held that the allegation must be tried immediately after the primary trial.

Levy: That is only when that trial has been before a jury. However, it is only fair to say that appellant was in bad health at the trial and appeared then as now to be deaf.

SHEARMAN, J.: He has pleaded by mistake.

THE LORD CHIEF JUSTICE, after reciting appellant's "record," which he described as "terrible," said that the Court accepted his statement that he did not understand at the moment that he was asked to plead to the allegation that he was a habitual criminal at the time of committing the housebreaking in question; he even says that he was prepared to contest that allegation by proving that he had been at work for some time. Moreover, he was admittedly in bad health at the trial and somewhat deaf, so that in the circumstances we may conclude that a mistake has been made and we may quash the finding that he is a habitual criminal. But possibly at some future time it may be necessary to consider whether this allegation cannot be tried some time after the primary charge—at any rate if a mistake of this sort occurs.

Conviction as habitual criminal quashed; sentence in the primary charge to run from the date of conviction.

H. C.

1929.
11 *January.*

ALFRED ARNOLD AYLES.

Hewart, L.C.J., Avory, J., Shearman, J.

ALFRED ARNOLD AYLES.

Carnal Knowledge of Child—First Offence—Youthful Prisoner.

Severity of sentence.

Appeal against sentence by leave of the Court.

Appellant was convicted on November 20, 1928, at the Central Criminal Court, of carnal knowledge of a girl under thirteen years of age and was sentenced by Swift, J., to seven years' penal servitude.

J. Christmas Humphreys, for the Crown, was not instructed to argue against the appeal.

The Court, in view of the appellant being only twenty-five years of age, and not having offended before—though this was a clear case—reduced the sentence to one of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

H. C.

1929.
11 *January.*

JAMES KNIGHT.

Hewart, L.C.J., Avory, J., Shearman, J.

JAMES KNIGHT.

Habitual Criminal Previously so Found—Later Allegation of Being Such—Onus.

A jury trying the issue of being a habitual criminal or not must be expressly warned, where the Crown proves such a previous finding, that the *onus* of proving that the accused is *still* a habitual criminal at the material period rests on the Crown and not that of disproving it on him.

Appeal against sentence, and application for leave to appeal against conviction as a habitual criminal.

Appellant was convicted on November 29, 1928, at the Manchester Assizes, of making counterfeit coin and was sentenced by Humphreys, J., to seven years' penal servitude and to seven years' preventive detention as a habitual criminal.

1929.
11 *January.*

JAMES KNIGHT.

Hewart, L.C.J., Avory, J., Shearman, J.

Appellant in person: He took exception to certain passages in the learned Judge's summing up.

The Court asked

J. C. Jolly, for the Crown, whether he could justify all those passages.

He replied that the summing up purported to follow C. L. NORMAN, [1924] 2 K. B. 315; 93 L. J. K. B. 883; 131 L. T. 29; 27 Cox C. C. 621; 88 J. P. 125; 68 S. J. 814; 40 T. L. R. 693; 18 Cr. App. R. 81; *c.q.* (thirteen Judges). It is true that the learned Judge told the jury that though the Crown did not rely on the fact that appellant had been previously convicted three times of serious crimes, "though in fact I think they have proved incidentally that he has been three times previously convicted of crimes," they did rely on the fact that "they have proved to you that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention," but he goes on to tell them distinctly that this is not enough in law for a conviction.

AVORY, J.: But he throws the burden on the prisoner by telling them that the prisoner is entitled to call evidence to show that he is not a habitual criminal at the material time; the *onus* is not on the prisoner.

THE LORD CHIEF JUSTICE: In several passages of this summing up the law is correctly stated, but in at least two others it is not correctly stated. The total effect is misleading, for the jury may well have thought that they were entitled to find that the appellant was at the material time a habitual criminal on the sole ground that he had at some previous time been found to be a habitual criminal. But that is not the case.

Conviction as habitual criminal quashed; sentence to run from the date of conviction.

H. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ACTON AND MR. JUSTICE MACNAGHTEN.

1929.
28 *January.*

WILLIAM LONDESBOROUGH TOWERS.

Imprisonment—Fine—Application against Conviction (only)—Leave to Appeal against Sentence asked—Amendment—Communication from the court below.

In a proper case (especially with the concurrence of the Crown) the Court will allow an application for leave to appeal against conviction to be treated as one for leave to appeal against sentence (and may thereupon deal with it as such).

Application for leave to appeal against conviction.

Applicant was convicted at West Kent Quarter Sessions on January 3, 1929, of unlawfully treating a venereal disease, contrary to section 1, sub-section 1 of the Venereal Diseases Act, 1917, and was sentenced by the Acting Deputy-Chairman to one month's imprisonment in the second division.

M. Garsia, for applicant, who was present, on bail:

The Acting Deputy-Chairman did not sufficiently put before the jury the defence, which was that there had been a wrong diagnosis of the complaint. The application is only for leave to appeal against conviction, but the Court is now requested to give leave to appeal against sentence also.

B. H. Waddy, for the Crown, raised no objection to the application being extended so as to include the question of sentence.

The Court granted the application.

THE LORD CHIEF JUSTICE: The applicant did not give evidence at the trial, but the case for the defence was indicated in a long speech on his behalf. The Acting Deputy-

1929.
28 *January.*

WILLIAM LONDESBOROUGH TOWERS.

Hewart, L.C.J., Acton, J. Macnaghten, J.

Chairman proceeded, in his summing-up, to point out clearly what the issue was, at least twice. In face of those plain statements, this Court is asked to say that the defence was not put to the jury. The defence clearly was put to them, and there appears to be no reason at all for giving leave to appeal against conviction.

The question of sentence stands on a different footing. For some reason quite unintelligible to us the applicant omitted to apply for leave to appeal against sentence. As counsel for the Crown concedes the point, we are disposed to allow the notice of appeal to be amended so as to include an application for leave to appeal against sentence. As counsel for the Crown is present, we deal with the matter here and now. We do not think that this is a case in which the applicant, who is a chemist, should go to prison, and we have a note from the presiding magistrate of the court below that the court would have imposed a fine if they had thought they had power to do so, but that someone gave them to understand that they had no such power. It is perfectly obvious that they could have imposed a fine, and we do that for them. The sentence of imprisonment is quashed, and the sentence substituted is that the applicant do pay a fine of £50 and also the costs of the prosecution.

Sentence of imprisonment quashed: fine, etc., inflicted.

Solicitors for applicant, Wallace, Watson & Flint, Chatham.

T. R. F. B.

1929.
28 *January.*

JOHN HENRY KNOWLES AND LOUIS DE ANTIQUIS.

JOHN HENRY KNOWLES AND LOUIS DE ANTIQUIS.

Hewart, L.C.J., Acton, J. Macnaghten, J.

Evidence at the Trial—Verdict against the weight of Evidence—Dissatisfaction of the Judge below.

Conviction quashed in view of the inadequacy of the evidence for the prosecution at the trial and of the view thereof of the Judge at the trial.

Appeals against conviction and sentence.

Appellants were convicted at the Central Criminal Court on November 13, 1928, of conspiring to defraud, and of receiving goods knowing them to have been obtained by false pretences, and were sentenced by Commissioner Judge Atherley-Jones, K.C., to nine months' imprisonment with hard labour and the same term in the second division respectively.

S. T. T. James, for appellant Knowles, who was present: The conviction here was against the weight of evidence, and the Judge did not sufficiently direct the jury. [He was stopped.]

Frank Powell, for appellant De Antiquis, who was present, was not called upon.

Eustace Fulton, for the Crown, did not seek to support the conviction.

THE LORD CHIEF JUSTICE: It is quite clear, when one looks at the evidence in this case, that the case for the prosecution was not satisfactory. There is a further difficulty arising from the summing-up, and it is right to add that the Judge who tried the case is of opinion, and has stated it to this Court, that the conviction is not, in the circumstances, a safe one. That being so, we have come to the conclusion that this appeal, as regards each of the appellants, ought to be allowed, and that both convictions ought to be quashed.

Convictions quashed.

Solicitors for appellant Knowles, A. H. Dabbs & Son; for appellant De Antiquis, Philip Conway, Thomas & Co.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACNAGHTEN.

ROBERT HENRY LITTLER GORING.

1929.
4 *February.*

Summing-up—Brevity—Severity of Sentence.

Appeal against conviction and sentences.

Appellant pleaded guilty at Caernarvonshire Sessions on January 3, 1929, to an indictment charging him with obtaining credit by fraud, and was convicted upon another indictment for larceny of an overcoat. He was sentenced by the chairman to twelve months' imprisonment with hard labour on the first charge, and to two years' imprisonment with hard labour on the second charge, the sentences to run concurrently.

G. K. Rose (with him *George Bankes*), for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The summing-up was unsatisfactory. It was extremely short, and the defence was never put to the jury. This was all the more essential as appellant was unrepresented at the trial. The sentence for larceny was excessive.

E. A. Hawke, for the Crown, was not called upon to argue in regard to the conviction.

THE LORD CHIEF JUSTICE: A complaint has been made that in the summing-up brevity was carried too far. The summing-up is indeed short, but it clearly states the issue did the accused take the coat with the intention of appropriating it to his own use? The two versions of the story are then contrasted. Brief as the summing-up is, it cannot be said, in a simple case of this kind, that it was so

1929.
4 *February.*

ROBERT HENRY LITTLER GORING.

Hewart, L.C.J., Avory, J., Macnaghten, J.

inadequate as to amount to a misdirection. There is no reason to interfere with the conviction.

With regard to the sentence for larceny, it appears to us that, notwithstanding the bad record of the accused, a sentence of two years' imprisonment with hard labour is too severe, having regard to the nature of the offence. That sentence will be reduced to one of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE McCARDIE.

1929.
11 *February.*

FRANCIS KENNY.

Housebreaking — Malicious Damage — Different but Concurrent Sentences—Severity of Sentence.

The Court discourages distinct charges for practically the same offence.

Appeal against sentences.

Appellant pleaded guilty at the West Riding (Leeds) Sessions on January 7, 1929, to pavilion breaking and larceny, and also to committing malicious damage. He was sentenced by the Chairman to three years' penal servitude in respect of the pavilion breaking and larceny, and to twelve months' imprisonment with hard labour in respect of the malicious damage, the sentences to run concurrently.

Appellant in person.

No counsel appeared for the Crown.

1929.
11 *February.*

FRANCIS KENNY.

Hewart, L.C.J., Avory, J., McCardie, J.

THE LORD CHIEF JUSTICE: The malicious damage in this case was an incident of the breaking in, but nevertheless the appellant was sentenced in respect of each offence as though they were distinct offences. He is sixty-one years of age. Though his record is not good, there was a period of nine years during which no conviction occurred, and the longest sentence he has served up to the present time is one of twelve months' imprisonment. It is obvious that there should not be concurrent sentences for two aspects of the same matter, and accordingly this Court will quash the conviction for malicious damage and, in respect of the pavilion-breaking and larceny, will substitute for the sentence of penal servitude a sentence of twelve months' imprisonment with hard labour.

One conviction quashed.
One sentence reduced.

T. R. F. B.

HENRY PEARCE.

1929.
11 *February.*

HENRY PEARCE.

Hewart, L.C.J., Avory, J., McCardie, J.

Co-defendants — Night Poaching Act — Assault—Common Intent—Misdirection.

There must be a careful direction to the jury on the nature of common enterprise in the case of poachers charged with violence.

Appeal against conviction and sentence.

Appellant was convicted at Montgomeryshire Sessions on January 3, 1929, of an assault under section 2 of 9 Geo. 4, c. 69, the Night Poaching Act, 1828, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour.

Bertram Long, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant was engaged in poaching jointly with a man named Humphreys, and an assault was committted by

1929.
11 *February.*

HENRY PEARCE.

Hewart, L.C.J., Avory, J., McCardie, J.

Humphreys on a bailiff named Hobbs. There was no evidence that appellant and Humphreys had a common purpose to assault anyone. The common intent of poaching is not sufficient to affect appellant with the intent of assaulting a bailiff. There was no evidence from which the jury could draw the inference that the nature of the enterprise was such that a common purpose to resist arrest at all costs must have existed. [He referred to PRIDMORE, 77 J. P. 339; 29 T. L. R. 330; 8 Cr. App. R. 198: 1913.] There was no proper direction to the jury on the question of common purpose.

[He was stopped.]

E. A. Hawke, for the Crown:

There was some slight evidence of a common purpose to assault the bailiff, because appellant did not run away till after the struggle between Humphreys and the bailiff had commenced. It cannot, however, be argued that the summing-up was satisfactory, and it is difficult to support the conviction.

AVORY, J.: The question in this case which the jury had to decide was whether the appellant had either asaulted the bailiff, or had been a party to an assault upon him. The only evidence against the appellant was that he was poaching in the night time together with a man named Humphreys. The bailiff Hobbs, hearing shots in one of the woods, hid himself and presently heard someone approaching. He said that he saw the figures of two men, and jumped at the first of them (which implies that one man was in front of the other) and was immediately struck on the side of the head with the stock of a gun which that man was carrying, and that then both the man who had struck the blow and the other man escaped. The evidence clearly pointed to the fact that it was Humphreys who was in possession of the gun, and struck the actual blow.

The question which ought to have been put to the jury

1929.
11 *February.*
HENRY PEARCE.
Hewart, L.C.J., Avory, J., McCardie, J.

was Was there any evidence that Pearce was a party to the assault with the gun, in the sense of having arranged with Humphreys that, if they were interrupted in their poaching, they would assault a bailiff or anyone else who interrupted them with a gun or other weapon? And further, was there any evidence from which the jury would properly infer that Pearce and Humphreys went out with a common purpose, not merely to poach, but also to resist apprehension at all costs, even by violence if necessary. There was no evidence that Pearce took any actual part in the assault. In the summing-up there was no direction to the jury on the only principle on which they could convict a man who had run away and had taken no actual part in the assault.

In these circumstances this Court is of opinion that the jury may have been entirely misled into thinking that the mere fact that the two men were out poaching together by night justified them in convicting both of any assault committed by one. The conviction must, accordingly, be quashed.

Conviction quashed.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HORRIDGE AND MR. JUSTICE ROWLATT.

JOSEPH REGINALD **VICTOR** CLARK.

1929.
25 *February.*

Murder—Plea of Guilty—Withdrawal of Confession in Notice of Appeal.

When no reason is shown to the Court to believe that a plea of guilty has been improperly accepted, it will decline to interfere.

Application for leave to appeal against conviction.

Applicant pleaded guilty at the Liverpool Assizes on

1929.
25 *February.*

JOSEPH REGINALD VICTOR CLARK.

Avory, J., Horridge, J., Rowlatt, J.

February 4 to an indictment for murder, and was sentenced to death by Mr. Justice Finlay.

Basil Nield, for applicant (under section 10 of the Criminal Appeal Act, 1907), who was present:

I was briefed for the defence, but as prisoner would not accept my advice, I did not appear.

There was, of course, no evidence offered below. It is true that the learned Judge carefully warned prisoner of the effect of his plea, and that the latter persisted in it. But he now withdraws his confession and asserts that he made it to screen someone dear to him. "If," says Best (Evidence, 12th ed., p. 471), "the confession appears incredible, or any illegal inducement to confess has been held out to the accused, or if he appears to have any object in making a false confession, or if the confession appears to be made under any sort of delusion or through fear and simplicity, the Court ought not to receive it." There ought to be independent evidence of homicide—other than that of the confessor.

HORRIDGE, J.: There was evidence on the depositions.

Nield: On the point of the motive of his self-accusation. I should like to read the letter applicant wrote from prison to his solicitor nine days before the hearing.

The Court declined to make an exception in this case.

Nield: The Court could send the case down for trial—a course taken in INGLESON, [1915] 1 K. B. 512; 84 L. J. K. B. 280; 112 L. T. 313; 24 Cox C. C. 527; 11 Cr. App. R. 21, c. q.

Fraser Harrison, for the Crown, was not called upon.

AVORY, J., in the course of judgment, remarked: This Court had held that when there had been a plea of guilty in unambiguous terms, it could only interfere if it had reason to suppose that the accused did not thoroughly appreciate the charge in law or had not intended to admit that charge—

1929.
25 *February.*

JOSEPH REGINALD VICTOR CLARK.

Avory, J., Horridge, J., Rowlatt, J.

which, it was agreed, was not the case here. Nor was this an instance of a false confession.

His Lordship added that even the facts which applicant had stated to the Court in his notice of appeal constituted no answer to the charge. Counsel had rightly advised appellant that his only possible defence was insanity and the Court was of opinion that he was right in his belief that such a plea must have failed.

Application dismissed.

H. C.

ARTHUR GASKELL.

1929.
25 *February.*

ARTHUR GASKELL.

Avory, J., Horridge, J., Rowlatt, J.

Count Not Proceeded With—Defendant's Right to a Verdict Thereon —Witness on the Depositions Relating to that Count Not Allowed to be Called—Proviso to Section 4 of the Criminal Appeal Act.

Proviso to section 4 of the Criminal Appeal Act applied despite a manifest error in procedure.

Appeal against sentence.

Appellant pleaded guilty at the Central Criminal Court on January 29 to three counts for housebreaking and stealing, and was found to be a habitual criminal and was sentenced on January 31, by the Common Serjeant, to six years' penal servitude and six years' preventive detention. He asked at the trial to have sixteen other charges taken into account: the value of the goods stolen to which these charges referred was about £2,800.

Appellant, in person.

Perceval Clarke, for the Crown: A count not tried was ordered to remain on the file.

HORRIDGE, J.: In such a case I always tell defendant that he is entitled to have a verdict on the charge if he so wishes.

1929.
25 *February.*

ARTHUR GASKELL.

AVORY, J.,
HORRIDGE, J.,
ROWLATT, J.

The only point calling for report sufficiently appears from the judgment, in the course of which

AVORY, J., said: To one count in the indictment prisoner pleaded not guilty, and the prosecution stated that that count would not be proceeded with. The record of appellant fully justified the terms inflicted, but he had raised the point that there was an irregularity at his trial. He had several times said that he wished to call Mrs. Anderson, the owner of the property he was alleged in count one to have stolen, on the ground that, as she was his accomplice in several crimes, this would tend to mitigate his punishment: this he had insisted on several times, but the learned Judge told him each time that as the count concerning Mrs. Anderson had been dropped, he could not call her. Even before the summing-up the learned Common Serjeant had forgotten to ask him whether he wished to call any witness (after he had himself been in the box) and when, at the conclusion of the summing-up, he repeated his request to call Mrs. Anderson, this was refused. This was clearly an error. His right to call her was none the less because she was not wanted to depose on count one.

His Lordship then dealt with the facts and admissions of the case and added that these were so conclusive that despite the undoubted irregularity in procedure, the Court would apply the proviso to section 4 of the Criminal Appeal Act: the jury could not possibly have come to any other conclusion, if Mrs. Anderson had been called.

Appeal dismissed.

H. C.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE ROCHE AND MR. JUSTICE HUMPHREYS.

WALTER EDWARD TUTTLE.

1929. 11 *March.*

Fraudulent Conversion by Trustee—Charge under Section Repealed and Re-enacted—Amendment of Defective Indictment—Confession of a Misdemeanour in Compulsory Process — Admission in "Preliminary" Examination in Bankruptcy—Evidence on Subsequent Charge.

When a section has been repealed and re-enacted an amendment in an indictment by which the earlier section is substituted for the later may be good.

The disclosure referred to in section 85 of the Larceny Act, 1861, must be that of the offence alleged; an answer thereto is not protected.

An affidavit in reply to an originating summons is a voluntary and not a "compulsory" statement within that section.

Nor is a statement of affairs in the "preliminary" examination in bankruptcy "compulsory" within that section.

Severity of sentence on persons in a fiduciary position.

Appeal against conviction, and application for leave to appeal against sentence.

Appellant was convicted at Norfolk Assizes on January 30, 1929, of fraudulent conversion as a trustee and was sentenced by Mr. Justice Talbot to four years' penal servitude.

S. Gerald Howard, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The offence which the appellant was alleged to have committed took place in March, 1916. He was originally indicted for fraudulent conversion under section 21 of the Larceny Act, 1916. The attention of the Judge was called to the fact that, by section 50 of that Act, the Act did not come into force until January 1, 1917. The prosecution sought to amend the indictment by substituting for section 21 section 80 of the Larceny Act, 1861. An objection was taken on behalf

1929.
11 *March.*

WALTER EDWARD TUTTLE.

Avory, J., Roche, J., Humphreys, J.

of the accused, but the Judge allowed the indictment to be so amended. It is submitted that the amendment should not have been allowed. Where an offence has originally been charged under one statute the substitution of a charge under another statute is much more than a technicality. The object of specifying the statute and section of the statute under which a person is charged is to enable those representing the accused to concentrate their attention on the particular statute and section, and on any defences that may be available thereunder. It is contended that here it was not within the power of the Judge to allow this amendment, but, even if he had the power, he should not have allowed it, as this is just the kind of amendment which would be likely to cause injustice to an accused person. Secondly, the appellant was protected from prosecution for this offence by the terms of section 85 of the Larceny Act, 1861, which provides: "no person shall be liable to be convicted of any of the misdemeanours [in section 80, etc.] by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved." There was in this case a "disclosure" within the meaning of the above section, inasmuch as the appellant's act was disclosed in his affidavit in reply to proceedings commenced against him in the Chancery Division by originating summons supported by affidavit, and also in the appellant's own bankruptcy examination. Thirdly, the appellant's answers to the Official Receiver at his preliminary examination in bankuptcy were admitted in evidence at the trial, contrary to section 43, sub-section 3 of the Larceny Act, 1916, which provides: "In any proceedings in respect of any offence against section . . . 21 . . . of this Act, a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter

1929.
11 *March.*

WALTER EDWARD TUTTLE.

Avory, J., Roche, J., Humphreys, J.

in bankruptcy shall not be admissible in evidence against that person." The appellant must, in his own view, have been faced with the complete necessity of answering those questions.

[The Court stated that the question of sentence should be considered at this hearing.]

The sentence was excessive in view of the fact that the appellant had been a man of the highest character and respectability up to the date of the commission of this offence. In addition to having this charge hanging over his head for a number of years, he has already suffered some imprisonment as a result of the bankruptcy proceedings.

C. G. Moran, for the Crown, was not called upon.

MR. JUSTICE AVORY[1]: The appellant, Walter Edward Tuttle was convicted at the Assizes at Norwich of the offence of fraudulent appropriation by him of a sum of £650 15s. 2d., trust money which he had in his possession as trustee under the will of one William Joseph Fowler, the appellant being joint trustee with the widow. A cheque for that amount came into his possession on March 9, 1916, and so far as the merits of the case were concerned there was no room for dispute that the appellant had appropriated the proceeds of that cheque to his own use and had concealed the misappropriation from the widow, his co-trustee, by representing to her that the money had been invested, and by paying to her the sum of £1 per week as though it were, or represented, interest on the money which had been invested. For many years, certainly up to 1925, the appellant kept the widow, his co-trustee, in the dark, notwithstanding her inquiries, about what had been done with this money. In that year she, having taken advice, instituted proceedings in the Chancery Division by originating summons calling upon the appellant to account for his dealing with the trust estate.

[1] This judgment is printed from a *verbatim* transcript supplied by the courtesy of the Director of Public Prosecutions.

1929.
11 *March.*

WALTER EDWARD TUTTLE.

Avory, J., Roche, J., Humphreys, J.

The result of those proceedings was that he did in fact produce a sum of about £275, and upon his admission made in those proceedings that he had in fact received, or had become liable to account for, a total sum of £1,000, an order was made upon him to produce the balance, and upon his failure to do so he was committed to prison, where we are told he remained in custody for a period of about two months.

Those being the facts, an indictment was presented against him at the Assizes alleging upon its face that he had been guilty of fraudulent conversion as a trustee contrary to section 21 of the Larceny Act, 1916. In the course of the proceedings, when it appeared that the alleged offence had been committed in March, 1916, the attention of the learned Judge was called to the fact that by section 50 of the Larceny Act, 1916, that Act did not come into force until January 1, 1917. An objection being taken the learned Judge after argument ordered the indictment to be amended by substituting for section 21 of the Larceny Act, 1916, section 80 [2] of the Larceny Act, 1861.

Now before us to-day counsel has taken on behalf of the appellant, three points, which he submits are objections to this conviction; and he has argued those points of law with conspicuous clearness and ability. First of all he says that there was no power in the learned Judge to amend the indictment in the way in which he did amend it; the second point is that in section 85 of the Larceny Act, 1861, there is a provision that no person shall be liable to be convicted of any of the misdemeanours in any of the sections mentioned (which include section 80) "if he shall at any time previously to his being charged with such offence have first disclosed such act on oath in consequence of any compulsory process of any Court of Law or Equity in any action, suit or proceeding which shall have been *bona fide* instituted

[2] Section 80 is repealed by the Larceny Act, 1916, but the remedy is preserved by section 38, sub-section 2 (*d*) of 52 & 53 Vict. c. 63, the Interpretation Act, 1889.

1929.
11 *March.*

WALTER EDWARD TUTTLE.

Avory, J.,
Roche, J.,
Humphreys, J.

by any person aggrieved." Counsel contended that there was in this case a disclosure within the meaning of that section by the appellant which protects him from being subsequently prosecuted for that offence. The third point is that in section 43, sub-section 3 of the Act of 1916 there is a provision that "a statement or admission made by any person in any compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy shall not be admissible in evidence," and it is suggested that there was in this case an improper admission of a statement or admission made by the appellant in a compulsory examination on the hearing of a matter in bankruptcy. These points require to be separately dealt with.

On the first point, the power of the court—of the learned Judge in this instance—to amend the indictment depends upon the provisions of section 5 of the Indictments Act of 1915, which provides: "Where before trial or at any stage of a trial it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case the required amendment cannot be made without injustice." The first question here is whether this indictment was defective within the meaning of that statute. We are clearly of opinion that the indictment alleging that this offence had been committed on March 9, 1916, and alleging that it was an offence against the Larceny Act of 1916, which in fact did not come into force until January 1, 1917, was defective on its face; and being so defective the only other question is whether the amendment which was made charging the offence to have been committed against a section of the Act which was then in force, namely, on March 9, 1916, was an amendment which could be made without injustice to the accused. When it appears, as it does, that the offence under the earlier Act of 1861 was in the same words as the offence under the Consolidation Act of

1929.
11 *March.*

WALTER EDWARD TUTTLE.

Avory, J., Roche, J., Humphreys, J.

1916, it is clear that the appellant could not have been prejudiced, and no injustice could have been done to any defence which he had, by this amendment. It is not like the case which was suggested during the argument of an indictment being amended so as to charge a person with an offence different from that for which he has been committed for trial. Here the offence was precisely the same, namely, the fraudulent appropriation by him as a trustee of trust money.

The second point turns upon the provisions of section 85 of the Larceny Act, 1861, which I have read; and the question there is whether the appellant had in fact previously to his being charged with this offence, first disclosed on oath the act in respect of which he was being charged, and whether that disclosure was in consequence of any compulsory process of any court of law or equity in an action by a party aggrieved. What was relied upon for this purpose as a disclosure was an affidavit made by the appellant in answer to the originating summons in the Chancery Division, in which the appellant, so far from disclosing an act which rendered him liable to be charged with a criminal offence, was saying or suggesting that he had invested this money, with the approval of his co-trustee and the beneficiary, in his own business, and that with her approval he was paying her a sum of £1 per week as interest upon it, and that he had been unable, on account of the difficulty of preparing accounts, to ascertain precisely the amount of capital which was left in his hands, but that to the best of his knowledge and belief it was between £900 and £1,000, so that the £1 per week represented interest at more than 5 per cent. per annum. So far from that being, as I have said, a disclosure of an act done by him which rendered him liable to be prosecuted, it was a disclosure of a defence or answer to any such accusation.

Quite apart from the question whether there was in fact any disclosure within the meaning of that section, it seems clear also that it was not a disclosure in consequence of any

compulsory process of any court of law. It was a voluntary statement made by the accused on affidavit, in answer to the allegation which was made against him. There was no compulsion upon him to file any affidavit at all, and no compulsion upon him to make any statement at that stage, with regard to what had become of this money. If authority were needed on this point, the case of the KING *v.* NOEL seems to be conclusive. The case is reported in [1914] 3 K. B. 848; 84 L. J. K. B. 142; 112 L. T. 47; 24 Cox C. C. 486; 10 Cr. App. R. 255. The effect of that decision is shortly stated in the headnote [3 K. B.]. "When an act done by a person is first disclosed by him without making any objection during cross-examination in a civil action, it is not disclosed by him 'in consequence of any compulsory process' of a Court of Law, within the meaning of section 85 of the Larceny Act, 1861, and he is liable to be convicted of an offence under the Larceny Act, 1901, in respect of the act so disclosed." If anything, the present case is *a fortiori* to that decision in the KING *v.* NOEL.

The third point, which has required a little more consideration, arises under section 43, sub-section 3, of the Larceny Act, 1916, which provides that in any proceedings in respect of any offence against section 21, among others, of this Act, which is the corresponding section to section 80 of the Act of 1861, "a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of a matter in bankruptcy shall not be admissible in evidence against that person." It is admitted that upon this trial evidence was admitted of certain answers made by the appellant in his bankruptcy in what is called a preliminary examination. The question arises whether those answers, or any of them, can be properly described as an admission made by him in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy. The case, decided in 1902, of the KING *v.* PIKE, which is reported [1902] 1 K. B. 552; 66 J. P.

1929.
11 *March.*

WALTER EDWARD TUTTLE.

Avory, J., Roche, J., Humphreys, J.

296; 71 L. J. K. B. 287; 86 L. T. 205; 18 T. L. R. 285; 50 W. R. 672; 9 Mans. 121; 20 Cox C. C. 164, decides that "A statement of affairs prepared by a debtor in the course of his bankruptcy under section 16 of the Bankruptcy Act, 1883, is admissible in evidence against him on a charge, under 24 & 25 Victoria, chapter 96, section 80, of misappropriation of money of which he was a trustee" [1 K. B.]. That was a decision of the Court for Crown Cases Reserved, consisting of five Judges; and we have to consider whether it can be said that these answers or admissions made by the appellant in what is called the preliminary examination are admissions made in any compulsory examination before any court. The learned counsel, with all his research, has been quite unable to furnish us with any reason to show that those answers are made in a compulsory examination before a court on the hearing of any matter in bankruptcy. In fact, looking at the Bankruptcy Act, there does not appear to be any ground for saying that that preliminary examination is of a compulsory character. It is not upon oath, and if, as was decided in the KING *v.* PIKE, a statement of affairs cannot be described as a compulsory examination or deposition within the meaning of that section, it follows *a fortiori* that this preliminary examination is not a compulsory one within the meaning of that section.

Therefore we have come to the conclusion that the evidence about what the appellant said in his answers in that preliminary examination was not improperly admitted; and so these objections in point of law to the conviction fail.

We have now been asked to consider the question of the sentence, which was one of four years' penal servitude. As the prosecution are here represented, it is not necessary to postpone a decision upon this question. The appellant was the clerk to a firm of solicitors, and it was in that capacity that he became entrusted with this money; and it is now well known that in cases of this description where a solicitor or solicitor's clerk is convicted of misappropriating trust money,

1929.
11 *March*.

WALTER EDWARD TUTTLE.

Avory, J.,
Roche, J.,
Humphreys, J.

a sentence of penal servitude almost invariably follows the conviction on such offence. Such sentence has been recognised as being appropriate because of the trust which is reposed in solicitors and their clerks, and the opportunity which is afforded them of being dishonest if they are so minded. In this case the appellant succeeded, as I have said, in keeping the widow in the dark for years—for at least nine years—about what had become of this money and how it had been invested, and she has been deprived, by his frudulent conduct, of the bulk of that estate. Therefore, we feel no doubt that a sentence of penal servitude was an appropriate sentence. But our attention having been called to the fact that the appellant has already suffered some imprisonment in consequence of his inability to refund this money, and in view of a previous character which apparently was without blemish until this affair, we have come to the conclusion that some slight reduction in the sentence which was passed should be made. It is not usual in this Court to interfere with sentences unless there has been some error in principle, or the sentence appears to be out of all proportion to the offence; but in view of the circumstances of this particular case, we think that we may properly reduce this sentence to one of three years' penal servitude, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE AND MR. JUSTICE HUMPHREYS.

1929.
18, 19, 20, 21 *March.*

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Conspiracy—Separate Trials of Defendants—Evidence only good against one Defendant—No Application to quash Indictment—Conspiracy to effect Various Objects—Summing-up on Nature of Conspiracy and Conspiracies Charged.
Sentence Running from Date of Conviction.

To prove conspiracy it is not necessary that there should be direct communication between each conspirer and every other, but the criminal design alleged must be common to all.

The length of time necessarily taken in preparing transcripts of proceedings for the use of the Court may in the case of abnormal delay be a ground for ante-dating conviction to the decision of the appeal.

Appeals against conviction.

Appellants were convicted at the Central Criminal Court on January 29, 1929, the trial having lasted seven days, of conspiracy and of corruptly giving gifts and were each sentenced by Mr. Justice Avory to fifteen months' imprisonment with hard labour.

Sir Henry Maddocks, K.C. (*H. D. Roome* and *Enid Rosser* with him), for the appellant Meyrick:

The first count of the indictment charged both appellants together with ex-Sergeant Goddard and a woman named Gadda with "conspiracy to contravene the provisions of the Licensing Acts by the unlawful sale of intoxicating liquors and to effect a public mischief by obstructing the police of the Metropolis in the execution of their public duty and by corrupting officers of that force . . . and thereby to prevent the due administration of the law and prevent the course of

1929.
18, 19, 20, 21
March.

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

public justice." A count of this kind should not have been included in the indictment. No evidence was given of a design entertained by the appellant in common with the other persons named in that count. An application for separate trials was refused, and the result of the appellant being tried together with Goddard and Ribuffi was that prejudice was introduced by the reading of anonymous letters referring to the appellant received at Scotland Yard, and by reference to other matters which could not have been admitted in evidence if the appellant had been tried alone. So, too, by reason of the count for conspiracy, evidence was let in which would have been excluded if the appellant had been tried on the count relating to corruption only. To sustain the charge of conspiracy, evidence should have been given of agreement between appellant and Ribuffi and appellant and Gadda: THE QUEEN'S CASE (1820), 2 B. & B., at 303; 22 R. R. 662; BOULTON AND PARKE (1871), 12 COX, C. C. 87; POLLMAN, ETC. (1809), 2 Camp. 229, note; RANKIN AND OTHERS (1848), 7 St. Tr. (N.S.) 711. There was no evidence of any conspiracy before the commission of the acts which it was alleged that the appellant had done; on the contrary, the evidence showed that the appellant could not have known what the other persons charged in the indictment were doing. [He referred to FEARGUS O'CONNOR AND FIFTY-EIGHT OTHERS (1843), 4 St. Tr. (N.S.) 935; 5 Q. B. 16; D. & M. 761; 13 L. J. M. C. 53; 7 Jur. 719; MULCAHY *v.* R. (1866-7), L. R. 3 H. L. 306; Ir. R. 1 C. L. 13; CHARLES STEWART PARNELL AND OTHERS (1881), 14 Cox, C. C. 508; MANNING (1883), 12 Q. B. D. 241; 48 J. P. 536; 53 L. J. M. C. 85; 51 L. T. 121; 32 W. R. 720; MURPHY AND ANOTHER (1837), 8 C. & P. 297.] To establish a charge of conspiracy, the conspirators need not necessarily know who their fellow-conspirators are, but they must know of the existence and nature of the conspiracy. The jury were never clearly directed that before they could convict of conspiracy they must first find that a general design existed, and that then they must look for evidence to show

1929.
18, 19, 20, 21
March.

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

that the appellant participated in it. On the evidence there were at least two conspiracies shown, which were improperly joined in the first count of the indictment. It was not satisfactorily explained to the jury that it would not be sufficient to show that the appellant and Goddard and Ribuffi and Goddard were engaged in similar conspiracies, but that it must be proved that all were engaged in the same general conspiracy.

Eustace Fulton (*R. E. Seaton* with him), for the appellant Ribuffi:

The attention of the jury was not directed to the extent of the authority given by Goddard to Ribuffi to act as his agent. If that authority was only a limited authority to reserve the money received in bribes for the purpose of non-interference with his own club, any act of Goddard in relation to Mrs. Meyrick or other persons was not within the scope of that authority, and nothing that they said or did and nothing that Goddard said or did in relation to them should have been admitted in evidence. Further, the jury were not adequately directed in regard to the facts that they must find before they could come to the conclusion that the conspiracy as charged was proved.

Percival Clarke (*G. D. Roberts* with him), for the Crown:

The indictment was perfectly valid, and no objection to it was taken at the trial. The case for the Crown was that the acts of all the accused were part and parcel of the same conspiracy revolving round the person of Goddard. The substance of the conspiracy charged was a conspiracy to corrupt the police. So long as the conspirators were working for one common object, it did not matter whether they knew each other or not. At the time of entering into a conspiracy, conspirators must know that there is a common object and that there are other conspirators, but they need not know the extent of the conspiracy. The jury were entitled to infer from the fact that the persons mentioned in the indictment

1929.
18, 19, 20, 21
March.

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

were found doing the same kind of thing that this was not a mere coincidence, but that they were acting in pursuance of a common design. [He referred to QUINN AND OTHERS, [1898] 19 Cox, C. C. 78.]

Maddocks, K.C., and *Fulton* replied.

THE LORD CHIEF JUSTICE[1]: These appellants, Mrs. Meyrick and Luigi Ribuffi, were convicted at the Central Criminal Court, together with one George Goddard, of conspiracy and of corruption, contrary to the first section of the Prevention of Corruption Act, 1906. Each of them was sentenced to 15 months' imprisonment with hard labour, and each of them now appeals against that conviction.

The argument upon the appeal has taken up a considerable amount of time, but not too much time, and the Court is indebted to all the learned counsel for all the care and the thoroughness with which the appeal has been presented.

The first count of the indictment alleged that Goddard and these two appellants on divers days between the 1st October, 1924, and the 24th November, 1928, in the County of London, conspired together, and with one Anna Gadda, and other persons unknown, to contravene the provisions of the Licensing Acts by the unlawful sale of intoxicating liquors, and to effect a public mischief by obstructing the Metropolitan Police in the execution of their public duty, and by corrupting officers of that force and contriving to secure that they should make to their superior officers false and misleading reports upon matters referred to them in the course of their official duty for investigation, and thereby to prevent the due administration of the law, and to defeat and pervert the course of justice. Each of these appellants was found guilty upon that count.

The third count charged that the appellant, Ribuffi, between the 9th November, 1925, and the 26th April, 1926, did corruptly give to an agent, that is, George Goddard, a gift

(1) This judgment is a *verbatim* transcript of a copy supplied by the courtesy of the Director of Public Prosecutions.

1929.
18, 19, 20, 21 *March.*

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

or consideration, to wit, £260, as an inducement or reward for doing or forbearing to do certain acts in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to the said Ribuffi in relation to his principal's affairs or business. The acts or forbearances in relation to the principal's affairs and business were referred to in the previous count, namely, reporting favourably, or forbearing to report truly and honestly, upon the conduct of a certain club.

Finally, so far as this appeal is concerned, in the fifth count of the indictment Mrs. Meyrick was charged for that between the 21st July, 1925, and the 2nd December, 1927, in the County of London, she did corruptly give to an agent, namely, Goddard, a gift or consideration, to wit £155 as an inducement or reward for doing or forbearing to do certain acts in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to Mrs. Meyrick in relation to his principal's affairs or business.

Upon the third count, Ribuffi was found guilty. Upon the fifth count, Mrs. Meyrick was found guilty. In other words, each of these appellants was found guilty upon the count charging conspiracy, and also upon a count charging the corrupt giving of an inducement or reward within the meaning of the Prevention of Corruption Act.

Now it was urged, and it is urged, on behalf of each of these appellants that they ought to have been separately tried; that there was no evidence of the conspiracy alleged in the indictment; that the making of that charge of conspiracy had the effect of letting in injurious evidence improperly; and finally that the learned Judge misdirected the jury.

Upon analysis those four objections appear to resolve themselves into one. They are an objection to the conspiracy count, and to the mode in which it was dealt with, and the effects which it produced at the trial.

Sir Henry Maddocks has laid before the Court with great ability, I need hardly say, the effect of the law with regard

1929.
18, 19, 20, 21
March.

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

to conspiracy. It is, no doubt, a difficult branch of the law, difficult in itself, and sometimes even more difficult in its application to particular facts or allegations. There is no substantial contest between the appellants and the prosecution upon the question what the law is. The real contest is on the way in which it was applied and ought to be applied to matters such as are disclosed in this prosecution. I will refer to two passages only in the mass of authorities of which the Court has been very properly reminded during the past three days. In the first place, in MULCAHY'S CASE, reported in 3 English and Irish Appeals, p. 306, at p. 317, Mr. Justice Willes, delivering the opinion of the Judges to whom questions had been put, said this: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, is punishable if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as Grose, J., said in REX *v.* BRISSAC, is generally 'matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.'" The other passage to which I wish to refer is in the well-known charge of Mr. Justice FitzGerald in the case of QUEEN *v.* PARNELL AND OTHERS reported in 14 Cox, Criminal Cases, at p. 515. Mr. Justice FitzGerald, having cited the words of Mr. Justice Grose which I have just read, said: "It may be that the alleged conspirators have never seen each other, and have never corresponded. One may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement. Thus, in some of the Fenian cases tried in this country, it frequently happened that one of the conspirators was in America, the other in this country;

1929.
18, 19, 20, 21
March.

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

that they had never seen each other, but that there were acts on both sides which led the jury to the inference, and they drew it, that they were engaged in accomplishing the same common object, and when they had arrived at this conclusion, the acts of one became evidence against the other"; and the learned Judge proceeded further to illustrate that proposition.

It has not been seriously disputed that the law relating to conspiracy is as it is stated to be in those passages. But it is said, first of all, and somewhat faintly, that this indictment itself is open to objection, and objection upon a particular ground. I say "somewhat faintly" because no application was made at the commencement of the trial to quash the first count in this indictment. But the criticism was undoubtedly made at more than one point in the trial at the Central Criminal Court that the first count might be regarded as alleging more than one conspiracy, or, alternatively, if it alleged one conspiracy, one conspiracy to effect two separate and distinct objects. That argument was presented, and presented more than once, before the learned Judge, and he dealt with it, and he held that upon the true construction of this count the conspiracy which was alleged was one conspiracy. In the words of the learned counsel for the prosecution it was "one big conspiracy revolving round the figure of Goddard," and when at a later stage the learned Judge came to deal with the matter again, he used these words (I am quoting from p. 328 of the transcript): "In my opinion this count charges a conspiracy to do an unlawful thing, that is to say, in substance to effect public mischief by corrupting the police force." That may be stated quite generally to be the object of this conspiracy in this indictment. But further, it is objected that there was, at any rate, confusion, and confusion not removed by sufficient direction on the nature of the conspiracy which this count alleged. That criticism seems to us to fail. It is quite obvious from various parts of this voluminous transcript that great stress was laid, and naturally laid, by learned counsel for each of these appellants upon the contention that

1929.
18, 19, 20, 21
March.

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

there was no evidence that either of them knew each other, or had met each other, or had consulted together. The learned Judge says, for example, at p. 539: "All the observations which have been made to you," that is to the jury, "of there being no evidence that Ribuffi and Mrs. Meyrick ever met or ever consulted together, or ever spoke to each other, are all beside the point altogether." It is argued that the jury were left under the impression that there might be various conspiracies and that it would suffice if they found the accused individually guilty of some one or other conspiracy. That seems to be an inaccurate criticism. It has been suggested that a clear distinction is to be drawn between two things which it is said are sharply opposed—on the one hand, a series of individual conspiracies between Goddard and one other person in each case, and, on the other hand, a general conspiracy to which the parties were Goddard and all the other persons. It is argued that those two things are mutually exclusive. No doubt in particular circumstances they might be mutually exclusive, but once it is conceded, as it must be conceded, that in order that persons may conspire together it is not necessary that there should be direct communication between each and all, one has to look at the circumstances to see whether this criticism of mutual exclusion is satisfactory. How precisely here is the case for the prosecution put? It is not suggested that Mrs. Meyrick was in direct communication with Ribuffi, but it is more than suggested—nay, the jury are asked to find as a fact upon the evidence—that Mrs. Meyrick was in communication with Goddard, and that Ribuffi was in communication with Goddard, and not for a purpose individual and special in the one case to Mrs. Meyrick, or in the other case to Ribuffi, but for a common design—a design common to all of them—a common design, namely, that stated by the learned Judge in the words I have just mentioned.

It seems to us that it was clearly put to the jury that in order to find these persons, or any of them, guilty of the conspiracy charged in the first count of this indictment, it

1929.
18, 19, 20, 21 *March.*

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

was necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other, or directly consulting together, but that they entered into an agreement with a common design. Such agreements may be made in various ways. There may be one person, to adopt the metaphor of counsel, round whom the rest revolve. The metaphor is the metaphor of the centre of a circle and the circumference. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A communicates with B, B with C, C with D, and so on to the end of the list of conspirators. What has to be ascertained is always the same matter: is it true to say, in the words already quoted, that the acts of the accused were done in pursuance of a criminal purpose held in common between them? Now, if that is the true view, it seems to us that that view was made plain to the jury. No doubt this first count in the indictment is not quite happily expressed. It might well have been expressed otherwise. But once it appears that the true meaning of that count is what the learned Judge described it as being—a construction, one may observe, accepted by both of the learned counsel for the appellants—then the matter becomes plain.

Various criticisms have been made upon particular passages in the summing-up. They come back, really, to the same criticism, that the jury were not sufficiently directed, or, even in one passage, were actually misdirected upon the law of conspiracy in relation to this indictment. In the opinion of the Court that criticism fails. It really depends upon a misuse of the passage in which the learned judge is dwelling upon the lack of necessity to prove that the various conspirators actually met or consulted together, or spoke to each other. The essential ingredient of conspiracy, conspiracy that is to say, for one common design, was, it seems to us, made quite clear.

Now, if that is so, various consequences follow. The

further criticism that this indictment could not fairly be made to comprehend a charge of conspiracy fails. The attention of the Court has been directed to a well-known passage in which judicial remark was made upon the unfairness that flows from the inclusion of a count for conspiracy in an indictment in which there ought to be no such count. The unfairness in such a case is, of course, manifest. But the criticism has no relation at all to a case where the circumstances are such as to call for the inclusion of a count for conspiracy, and to call for it in the public interest for the due administration of justice. No doubt, if one may follow an illustration which was suggested, if two persons are about to be charged with the substantive crime of larceny, and the evidence is that they did in fact steal something, unfairness might arise if they were charged with a conspiracy to commit that crime. But that criticism does not apply to the present indictment. What is alleged here is something far more than the individual acts referred to, for example, in counts three and five. What is referred to here is a conspiracy not only between Ribuffi and Mrs. Meyrick and Goddard, but also between them and other persons—a widespread conspiracy for the accomplishment of a purpose going beyond the giving or receiving of a bribe. The object of the conspiracy was to secure the results which the bribes were intended to secure. The object of the conspiracy was not to bribe; the bribe was a means to the end. The end of the conspiracy was of a more far-reaching character than the individual act. Finally, it is said that here there was no evidence upon which this conspiracy could properly be found to exist. In our opinion the evidence was ample. It is not necessary to review the whole of the circumstances, but here was a comparatively small geographical area where there was a police sergeant of a particular position, charged with the performance of particular duties. The evidence clearly made it apparent to the mind of the jury that considerable sums of money reached that sergeant—money which had been in the banks of the other persons charged;

1929.
18, 19, 20, 21 *March.*

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

and there was further evidence to show that the money not only reached Goddard, but passed on to subordinates also.

In our opinion, therefore, the arguments which have been addressed to us, powerful as they are, fail. Here, as it seems to us, this count was sustained by sufficient evidence. The law was made clear to the members of the jury. The count was properly included in the indictment, and there is no ground whatever for suggesting that there has been anything in the nature of a miscarriage of justice.

Remarks have been made on the proviso to section 4 of the Criminal Appeal Act. In our opinion, those questions do not arise. There is no question here of the kind which is referred to in that proviso.

In these circumstances, and for these reasons, it appears to us that these appeals, and both of them fail, and ought to be dismissed.

Maddocks: May I apply that in the special circumstances of this case the sentence may run from such time as it would in the ordinary course of events? The transcript had to be prepared, and it was a very heavy matter. The special circumstances I have to put to your lordships are these; otherwise I would make no application, because I know it is not usual. There was quite an important question of law to be discussed.

THE LORD CHIEF JUSTICE: But, on the other hand, leave was not obtained.

Maddocks: No, it was on a question of law.

THE LORD CHIEF JUSTICE: You mean leave was not necessary?

Maddocks: Leave was not necessary. Your lordship sees that it would add materially to her sentence.

THE LORD CHIEF JUSTICE: When was sentence passed?

Maddocks: On the 29th January. I understand from my learned friend that the sentence runs from the first day of the Sessions.

1929.
18, 19, 20, 21 *March*.

KATE EVELYN MEYRICK.
LUIGI ACHILLE RIBUFFI.

Hewart, L.C.J., Roche, J., Humphreys, J.

THE LORD CHIEF JUSTICE: What day is that?

Maddocks: The 8th January, I am told.

THE LORD CHIEF JUSTICE: We are told by the learned Registrar that the difference here is a difference of six weeks. The matter depends upon the time when the notice was given. (*Their lordships conferred.*) In view of the special circumstances, including the necessarily long time which the preparation of the transcript involved, we think it is fair in this case that the sentences should run not from this day, but from the day on which they were passed.

Appeals dismissed.

Solicitors for appellants—Woolfe & Woolfe; P. S. Solomon, Archer & Co.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

WILFRED JAMES CROMPTON.

1929.
25 *March*.

Perjury.

Severity of Sentence.

Application for leave to appeal against conviction and sentence.

Applicant was convicted of perjury at Middlesex Sessions on March 9, 1929, and was sentenced by the Chairman to six months' imprisonment with hard labour.

No counsel appeared, and applicant was not present.

THE LORD CHIEF JUSTICE: It is not possible to interfere with the conviction, but with regard to the sentence, inasmuch

1929
25 *March.*

WILFRED JAMES CROMPTON.

Hewart, L.C.J., Avory, J., Swift, J.

as the applicant is a man of forty-three years of age who has never been previously convicted, and indeed is, so far as the police are aware, a perfectly respectable person, we think that the imprisonment should be served in the second division, and the sentence is varied accordingly.

Sentence varied.

T. R. F. B.

BEFORE

1929.
15 *April.*

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

RICHARD MILLICHAMP.

Technical Error in Sentence for Attempt—Habitual Criminal—Conduct since last Release from Prison — Length of Intervals Without Conviction in the past.

Penal servitude cannot be inflicted for attempted housebreaking. In directing the jury on an allegation of being a habitual criminal, all previous periods without a conviction should be reviewed.

Appeal against sentence, and application for leave to appeal against conviction as a habitual criminal.

Appellant pleaded guilty to housebreaking and attempted housebreaking at Birmingham City Sessions on March 6, 1929, and was convicted of being a habitual criminal. He was sentenced by the Recorder to three years' penal servitude for the housebreaking, and three years' penal servitude for the attempted housebreaking (the sentences to run concurrently) and to five years' preventive detention.

Appellant in person.

No counsel appeared for the Crown.

1929.
15 *April.*

RICHARD MILLICHAMP.

Hewart, L.C.J., Avory, J., Swift, J.

THE LORD CHIEF JUSTICE: With regard to the substantive offence there is evidently a slip in the terms in which sentence was passed. The appellant was sentenced to three years' penal servitude for the attempted housebreaking, to run concurrently with the sentence for the housebreaking. It is not possible to pass a sentence of penal servitude for an attempt only. There is, however, no reason for reducing the sentence of three years' penal servitude for the offence of housebreaking, in view of the appellant's record, and that sentence will stand, but the sentence for the attempt will be reduced to one of twelve months' hard labour, to run concurrently with the other sentence.

With regard to the charge that the appellant was at the time a habitual criminal, the facts are that the appellant is forty-four years of age, and has previously been convicted fourteen times. On two occasions, in October, 1911, and September, 1924, he was sentenced to penal servitude for burglary. He was released from that last sentence on licence in December, 1926, and according to the evidence in the court below he worked for a firm of contractors from January 21 to February 22, 1927, and left in consequence of shortage of work. The appellant said that he worked there till May, 1927, and now his insurance cards have been produced, which show an unbroken period of work for thirteen weeks from January 21, 1927, to the week beginning May 2, while another card shows that he worked for two weeks elsewhere in 1928. On the question whether it is true to say that at the crucial time a man is a habitual criminal, it is of great importance to look not only at his previous career, but also at what he has been doing or attempting to do since he last came out of prison. Here it is apparent on the materials before this Court that the appellant did work for a period of thirteen weeks at the beginning of the year 1927 and for some period in 1928, though he was on two occasions in the intervening period convicted of the offence of loitering. If these materials had

1929.
15 *April.*

RICHARD MILLICHAMP.

Hewart, L.C.J., Avory, J., Swift, J.

been before the Recorder, no doubt he would have addressed the jury in a different manner from that which he in fact adopted, and no doubt stress would have been laid on the great importance of the period of continuous work at the beginning of the year 1927. Nor can we omit to notice that at another period of the appellant's life there was a considerable interval without any conviction at all—namely, from May, 1915, to June, 1919, when he served in His Majesty's Forces and was discharged with a good character.

We are of opinion that in this case the fair course is to quash the conviction as a habitual criminal, and, therefore, though the sentence of three years' penal servitude for the primary offence will stand, the period of preventive detention as a habitual criminal will not be served.

One sentence reduced. Conviction as habitual criminal quashed.

T. R. F. B.

The Court (the Lord Chief Justice, Avory and Macnaghten, JJ.), also sat on April 22.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

1929.
29 *April.*

FELIX GREVILLE.

Extension of Time for Appeal—Sunday.

For the purpose of the statutory notice of appeal Sunday is not a *dies non.*

Appeal from order of Macnaghten, J., refusing extension of time for leave to appeal against conviction and sentence.

Applicant was convicted on March 25, at the Central Criminal Court, of gross indecency with a male person and

was sentenced by the Recorder to nine months' imprisonment in the Second Division.

1929.
29 *April.*

FELIX GREVILLE.

J. D. Cassels, K.C., with him *Eric Dunbar*, for the applicant, who was not present:

Hewart, L.C.J., Avory, J., Swift, J.

Extension of time for leave to appeal was refused by Macnaghten, J., as the applicant was one day out of time—Sunday, for this purpose, not being a *dies non*.

Extension of time allowed.

Solicitors for applicant—Grobel & Co.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

WILLIAM PRICE MORRIS.

1929.
6 *May.*

Previous Convictions—Long Period without Conviction.

Severity of Sentence.

Appeal against sentence by leave of the Court.

Appellant pleaded guilty at Denbighshire Sessions on April 55, 1929, to warehouse-breaking and larceny and was sentenced by the Chairman to twelve months' imprisonment with hard labour on each charge, the sentences to run concurrently.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant is thirty-four years old, and from 1907 onwards worked as a labourer at various places. He served in the Army from August, 1915,

1929.
6 *May.*

WILLIAM PRICE MORRIS.

Hewart, L.C.J., Avory, J., Swift, J.

to March, 1919, and when he was demobilised his character was marked "very good." In May, 1920, he entered the service of a railway company as a policeman, and in April, 1921, he was convicted of larceny and sentenced to six months' imprisonment with hard labour. He afterwards worked as a groom or gardener till January, 1924, when he was arrested on charges of larceny and was subsequently sentenced to four concurrent terms of six months' imprisonment with hard labour. He was released from serving that sentence in November, 1924, and from that time onwards has lived with his parents, and it appears that, when not otherwise employed, he has helped his father and brothers. Having regard to all the circumstances of the case and to the considerable periods during which the appellant has not committed any offence—especially the period from November, 1924, onwards—we think that the sentence may properly be reviewed, and that there may be substituted for it a sentence of six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

1929.
6 *May.*

THOMAS PARKINGTON.

Hewart, L.C.J., Avory, J., Swift, J.

THOMAS PARKINGTON.

Previous Convictions—Long Period without Conviction.

Severity of Sentence.

Appeal against sentence by leave of the Court.

Appellant pleaded guilty to larceny at Bolton Borough Sessions on April 8, 1929, and was sentenced by the Recorder to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

1929.
6 *May.*

THOMAS PARKINGTON.

Hewart, L.C.J., Avory, J., Swift, J.,

THE LORD CHIEF JUSTICE: The appellant is forty-two years of age, and has undoubtedly had many convictions, often for trivial offences, though there was a serious conviction for larceny and receiving stolen goods in 1914. From that time onwards he appears to have led an honest life for about nine years. He was then convicted of larceny in 1925, in 1926, and again in April, 1927. From that time, however, he appears to have avoided crime. On his liberation in January, 1928, he became chargeable to the Poor Law Guardians and was excused from task or relief work for some time on account of his health, and he appears to be a man who has suffered from very poor health. It is clear that from time to time he has made efforts, not without success, to refrain from committing crime. In all the circumstances, we think that the sentence may properly be reduced to a sentence of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

JAMES WILLIAM ATKINSON.

1929.
6 *May.*

JAMES WILLIAM ATKINSON.

Hewart, L.C.J., Avory, J., Swift, J.

Joint Indictment—Difference in Prisoners' Antecedents.

Discrimination should be exercised in sentencing prisoners jointly convicted of the same offences.

Appeal against sentence by leave of the Court.

Appellant pleaded guilty at Derbyshire Sessions on April 10, 1929, to housebreaking and larceny and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

Appellant in person.

No counsel appeared for the Crown.

SWIFT, J.: The appellant, together with a man named Jones, pleaded guilty to an indictment which charged them with breaking and entering a dwelling-house and stealing a

1929.
6 *May.*

JAMES WILLIAM ATKINSON.

Hewart, L.C.J., Avory, J., Swift, J.,

motor-cycle. Other cases were taken into consideration by the court in passing sentence. This Court is of opinion that in this case discrimination ought to have been exercised in dealing with the two men, inasmuch as they were not of similar character and there were not so many charges against Atkinson as against Jones. We have now considered the sentence passed upon the appellant, and have come to the conclusion that in all the circumstances of the case it should be reduced. Up to the end of 1928 the appellant was, apparently, a man of complete honesty and respectability, and the character given him by the police was that of a good, hard-working man. In 1929 the appellant and Jones, who was a man of bad character, together committed a number of offences. Bearing in mind the distinction between the two prisoners, and the fact that this is the first occasion on which the appellant has been convicted of crime, we think that justice will be done if the sentence is reduced to one of six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

1929.
6 *May.*

SIDNEY BROOKS.

Hewart, L.C.J., Avory, J., Swift, J.

SIDNEY BROOKS.

Defendants Jointly Indicted—Different Defences of Each—Summing-up.

In charging the jury the Judge must distinctly put the defence of each prisoner to them.

Appeal against conviction by leave of the Court.

Appellant was convicted at Dorset Quarter Sessions on April 3, 1929, of garage-breaking and larceny and was sentenced by the Deputy-Chairman to three years' detention in a Borstal institution.

1929.
6 *May.*

SIDNEY BROOKS.

Hewart, L.C.J., Avory, J., Swift, J.

J. J. Llewellin, for appellant, who was present (under section 10 of the Criminal Appeal Act, 1907):

Appellant was charged with this offence together with two other men. A motor car was stolen from a mews in Camden Town between March 7 and March 9. It was not suggested that the appellant was with the other two men when the car was taken. His case was that he met them subsequently at the Elephant and Castle, that he knew nothing of any theft, and was under the impression they were going for a pleasure ride. In the summing-up the Deputy-Chairman made no discrimination between the three prisoners. The case for the appellant was never put to the jury. There was no direction on the question of the intent necessary to constitute larceny. [He was stopped.]

W. M. Walker, for the Crown, did not seek to support the conviction.

THE LORD CHIEF JUSTICE: In view of the evidence, it is not surprising to hear that counsel for the prosecution practically invited the jury to acquit the appellant, and when one turns to the summing-up it is perhaps not surprising that the jury did not acquit, but treated all three prisoners as being on the same plane. It is quite obvious that the summing-up did not accurately refer to the evidence, that it put the burden of proof on the defence, that it drew no distinction between the three prisoners, and that it entirely failed to explain to the jury the question of intent. It is clear that this conviction cannot stand, and it is accordingly quashed.

Conviction quashed.

T. R. F. B.

The Court (Avory, J., Swift, J., and MacKinnon, J.) also sat on May 10.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ACTON.

1929.
16 *May.*

WALTER GEORGE DALE, *otherwise* GEORGE MANDERS.

Obtaining Credit by False Pretences—Maximum Sentence—Section 13, sub-section 1 of 32 & 33 Vict. c. 62, the Debtors Act, 1869.

Sentence not warranted by law rectified by the Court.

Application for extension of time for leave to appeal against sentence.

The applicant pleaded guilty at the Worcester Assizes on October 24, 1928, to obtaining credit by false pretences under section 13 of the Debtors Act, 1869, and was sentenced by Talbot, J., to eighteen months' imprisonment with hard labour.

The applicant was not present.

AVORY, J., stated that although the application was six months out of time, the sentence of eighteen months' imprisonment not being authorised under the Debtors Act, which provided a maximum penalty of twelve months, the sentence would be reduced to twelve months' imprisonment with hard labour to run from the date of sentence.

Sentence reduced.

N. E. W.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

FRANCIS KELLY ARMSTRONG. 1929. 10 *June.*

First Offence by a Youth—Punishment.

Severity of Sentence.

Appeal against sentence.

Appellant pleaded guilty at Middlesex Sessions on May 11, 1929, to two charges of housebreaking and larceny, and was sentenced by the learned Chairman to six months' imprisonment with hard labour on each charge, the sentences to run consecutively. A man indicted with him was acquitted.

Albert Crew, for the appellant, who was present:

The sentence was excessive in view of the appellant's youth and previous good record. He should have been dealt with under the Probation of Offenders Act, 1907.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant is eighteen years of age and has never been previously convicted, and it is apparent that, apart from this matter, he has had a good character and is well spoken of by his various employers. In all the circumstances, we do not think that this is a case in which the appellant should be sent to prison, and we revise the sentence in this way: we bind over the appellant in his own recognisances in the sum of £10 to come up for judgment if called upon, and to be of good behaviour and keep the peace for a period of two years, on condition that he shall obey the directions of the Probation Officers of Middlesex and Gateshead.

Sentence reduced and varied.

Solicitor for appellant: G. F. Wilkins.

T. B. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

1929.
24 *June.*

GERALD CURRIE KITCHING.

Grand Jury—Bill Ignored—"True Bill" Purported by Indorsement —Imperfect Indictment.

If a Grand Jury does not present an indictment as preferred, but desires to present for a different offence, it must present such offence in the normal way, not by indorsement of the original bill but by a fresh indictment.

Appeal against conviction.

Appellant was convicted of indecent assault at Westmorland Assizes on June 3, 1929, and was sentenced by Charles, J., to twenty months' imprisonment with hard labour.

G. A. Thesiger, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The bill of indictment preferred was one for rape, but the Grand Jury returned the bill indorsed "No true bill for rape. True bill for indecent assault (aggravated)." It is submitted that appellant was never validly indicted on a charge of indecent assault. In *Hawkins's Pleas of the Crown,* Book II, ch. 25, s. 2 (ed. Leach, vol. 4), it is stated of a Grand Jury: "It seems to be generally agreed that they must either find *billa vera,* or *ignoramus,* for the whole; and that if they take upon them to find it specially, or conditionally, or to be true for part only, and not for the rest, the whole is void and the party cannot be tried upon it, but ought to be indicted anew." [He was stopped.]

J. C. Jolly, for the Crown:

There is some authority for the view that a Grand Jury may ignore a bill for murder and return a bill for man-

1929.
24 *June.*

GERALD CURRIE KITCHING.

Hewart, L.C.J., Avory, J., Swift, J.

slaughter only; *Burn's Justice of the Peace*, 30th ed., vol. 3, p. 37. A Grand Jury may, moreover, find a bill of their own knowledge and on their own motion.

[AVORY, J.: That is not quite correct. A Grand Jury may present a person on their own knowledge and a bill of indictment may then be put before them.] Here the Grand Jury, by their indorsement, gave the prisoner sufficient notice that a bill was being presented against him for an indecent assault at the date and on the person named.

THE LORD CHIEF JUSTICE[1]: This appeal reveals a curious chapter of errors. The appellant, Kitching, was convicted at Appleby Assizes and was sentenced to twenty months' imprisonment with hard labour. He now appeals against conviction and sentence. When the question is asked: Of what crime was he convicted? the answer is by no means easy. The indictment is before the Court, and the offence charged in the indictment is the offence of rape. Upon the face of that indictment it appears that on the third day of June the appellant pleaded not guilty, but that the jury returned a verdict of guilty, and that thereupon judgment of twenty months' imprisonment with hard labour was pronounced. On the face of it, therefore, it appears that this appellant has been convicted of rape, and for that crime has been sentenced to twenty months' imprisonment with hard labour. But when the back of the indictment is examined, these words appear over the signature of the foreman of the Grand Jury: "No true bill for rape, a true bill for indecent assault aggravated"; and when one turns to the transcript of the shorthand note of the proceedings, it would seem that after the jury had ignored the bill for rape, endorsing those further observations upon the back of the bill, the trial proceeded as if a true bill had been found, whereby the appellant was charged with the offence of indecent assault.

(1) This judgment is printed from a transcript from shorthand supplied by the courtesy of the Director of Public Prosecutions.

1929.
24 *June.*

GERALD CURRIE KITCHING.

Hewart, L.C.J., Avory, J., Swift, J.

Now it is quite clear that this procedure cannot be supported. No doubt it was in the power of the Grand Jury to ignore the indictment for rape. No doubt it was in the power of the Grand Jury to present this appellant to be charged with the offence of indecent assault. But in those circumstances the proper course would have been that an indictment for the offence of indecent assault should then have been prepared and submitted to the Grand Jury. The course which has been actually observed here involves a series of contradictions. In the result the appellant has been convicted upon an indictment which has been ignored. The offence for which he was apparently tried and of which he was apparently convicted was an offence with which he was not charged in any indictment. What has happened is, that the suggestion of an alternative indictment, contained in the observations endorsed upon the bill of indictment, is treated as if it were a substantive indictment. Nevertheless the original indictment for rape is not treated as being ignored. On the contrary, it is upon the face of that indictment that the record appears that the appellant pleaded not guilty, but was found guilty and that he was sentenced to twenty months' imprisonment with hard labour. He was not committed for trial for indecent assault. That fact would have been immaterial, if, indeed, the suggestion of the jury had been acted upon, and he had been indicted for indecent assault with leave of the Judge (Vex. Ind. Act), and the indictment for rape had been, as the Grand Jury desired it to be, ignored and put an end to. But it is impossible that he should be validly tried for the offence of an indecent assault upon an ignored bill for rape, and in the absence of an indictment for indecent assault. The matter, therefore, comes before this Court in this way. The appellant appears on the face of the record to have been convicted of rape upon a bill which the Grand Jury found to be "no true bill." It is obvious, therefore, that there is only one course open to us, that is to allow this appeal and quash the conviction. What may happen

with regard to the charge of indecent assault is a matter upon which it is not necessary for us to express even so much as a conjecture.

1929.
24 *June.*

GERALD CURRIE KITCHING.

Hewart, L.C.J., Avory, J., Swift, J.

Jolly: Is it possible that the Order should be: That the conviction is quashed and the proceedings relating to the conviction be set aside on the ground that they are a nullity?

THE LORD CHIEF JUSTICE: No, we leave the matter where we left it; what we do is to allow the appeal and to quash the conviction.

Conviction quashed.

T. R. F. B.

THE O.K. SOCIAL AND WHIST CLUB, LTD.

1929.
24 *June.*

THE O.K. SOCIAL AND WHIST CLUB, LIMITED.

Hewart, L.C.J., Avory, J., Swift, J.

Common Gaming House—Bona fide *Members' Society Club*—"*Whist Drive.*"

There is a sufficient element of chance in the game popularly called a "Whist Drive" to make a club where it is played for money a "common gaming house."

Appeal against conviction.

The appellants were convicted of keeping a common gaming house on May 24 and were sentenced by the Recorder at Liverpool City Sessions to a fine of twenty shillings.

Glynn Blackledge, for appellants:

The Recorder adopted a wrong method of directing the jury, in telling them that it was impossible for them to hold that whist as played in this club was a game of skill. In JAMES DAVIES, [1897] 2 Q. B. 199; 66 L. J. Q. B. 513; 76 L. T. 786, c.q.; Lord Russell, C.J., said that the judge should define the law and direct the jury on it, and then leave it to the jury to apply the facts to that definition. Although he used the expression "these questions are questions of law for the judge," if that sentence is taken with its true context, and it is remembered that there had been in that case no direction

1929.
24 *June*.

THE O. K. SOCIAL AND WHIST CLUB, LIMITED.

Hewart, L.C.J., Avory, J., Swift, J.

at all on the law, it is submitted that Russell, C.J., did not mean that the judge must decide the point, as was done here, but only that he must define and direct on the law. All cases where there have been convictions for this class of offence hitherto have been cases of proprietory clubs kept for profit. If this conviction is right, every club is in danger of prosecution. [He referred to JENKS *v.* TURPIN, 13 Q. B. D. 505; 53 L. J. M. C. 161; 50 L. T. 808; 49 J. P. 20; 15 Cox C. C. 486: 1884, and MORRIS *v.* GODFREY, 106 L. T. 890; 76 J. P. 297; 28 T. L. R. 401; 23 Cox C. C. 40: 1912.]

Maxwell Fyfe, for the Crown, was not called upon.

THE LORD CHIEF JUSTICE: The able argument offered on behalf of the appellant seems to say that if the law is as it appears to be very serious consequences may follow, and that the law ought to be altered. The question for this Court is whether the existing law was properly applied in this case. [His Lordship described the incidents of a "whist drive"; they included "shuffling the partners as well as the cards."]

In JAMES DAVIES (*supra*), Lord Russell, C.J., used these words: "It appears that the jury were asked whether the house was used for unlawful gaming, and whether the game of 'German Bank' as played there was an unlawful game. These questions, however, are questions of law for the judge and not of fact for the jury, who must apply the facts to the definition of the law given by the judge." That judgment has been confirmed over and over again and this passage was cited with approval by this Court in KELLY AND OTHERS, [1927] 20 Cr. App. Rep. 12. In the present case, the definition which was adopted and applied by the Recorder was that of Hawkins, J., in JENKS *v.* TURPIN: "To no gaming-house is the public at large invited to go without restriction of some sort or other. The keeper of such a house has always the right to refuse admission to any one he pleases, or to make such rules as he may think fit for the regulation of such admission. Here, he placed himself in the hands of

1929.
24 *June*.

THE O.K. SOCIAL AND WHIST CLUB, LIMITED.

Hewart, L.C.J., Avory, J., Swift, J.

a committee to elect whom they would, provided only the number of members did not exceed 500. If the admission of 500 persons to a gaming-house does not make it a common gaming-house, it might equally be said that the admission of 5,000 would not. The law does not require that it shall be a public gaming-house; a common gaming-house is that which is forbidden, that is, a house in which a large number of persons are invited habitually to congregate for the purpose of gaming."

The Recorder held that this game of progressive whist, involving as it did at every turn the element of chance, and multiplying and confusing the element of chance by the progression of the partners throughout the evening, was not a game of skill, and that it was an unlawful game. He invited the jury to say whether it was true that these premises were premises where a large number of persons were invited to congregate for the purpose of playing an unlawful game. Unless a whole series of authorities is to be overruled, it is not possible to say that there has been any error in law. The appeal must be dismissed.

Appeal dismissed.

T. R. F. B.

Solicitor for appellant, John A. Behn, Liverpool; *Solicitor* for the Crown, the Town Clerk, Liverpool.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

ARTHUR WILLIAMS.

1929.
8 *July*.

Habitual Criminal—Admission by Prisoner Before Trial of Offence Committed—Purpose of Admission—Admissibility of Evidence.

On the trial of an allegation of being a habitual criminal an admission by the prisoner made (for any purpose) before that

1929.
8 *July*.

ARTHUR WILLIAMS.

Hewart, L.C.J., Avory, J., Swift, J.

trial that he has committed an offence is admissible in evidence against him.

The headnote to HAROLD JONES *al.* GEORGE WRIGHT, 16 Cr. App. R. 124 (1922) is incorrect and misleading.

Application for leave to appeal against sentence.

Applicant pleaded guilty to forgery, uttering forged documents and obtaining money by false pretences at the Central Criminal Court on June 4, 1927, and was sentenced by the Recorder of London to seven years' penal servitude.

No counsel appeared for the applicant, who was not present.

Percival Clarke, for the Crown.

Mr. JUSTICE AVORY (after dealing with the facts of the case)[1]: But there is another matter which calls for comment. In addition to these charges to which the accused pleaded guilty, he was also charged in the indictment with being a habitual criminal. After he had been given in charge to the jury for the purpose of that charge being investigated, the learned counsel who appeared for him said that he proposed to object to certain evidence that was going to be tendered by the prosecution; and the jury were asked to retire whilst this question was argued. The learned counsel then took the objection that evidence, he understood, was going to be given that the accused had admitted sixty-five other offences committed by him since his last release from prison; and he objected to the evidence being admitted on the ground that the accused had admitted them for the purpose only of being taken into account when sentence was passed upon him, so that he would not be liable to any further charge in respect of those offences; and he contended that that admission, having been made for that purpose only, the evidence was not admissible for the purpose of establishing that the accused

(1) From a transcript supplied by the courtesy of the Director of Public Prosecutions.

1929.
8 *July.*

ARTHUR WILLIAMS.

Hewart, L.C.J., Avory, J., Swift, J.

was a habitual criminal. In support of that argument he referred to a reported case of THE KING *v.* HAROLD JONES, *alias* GEORGE WRIGHT, reported in the 16th volume of the Criminal Appeal Reports, at p. 124 [1922: conviction as habitual criminal quashed], the headnote to which is in these words: "Evidence that a person alleged to be a habitual criminal has committed a specific crime for which he has not been tried, is not admissible to prove that he was leading a dishonest life during the statutory period." There are two errors in that headnote: first of all, there is no meaning in "the statutory period," and secondly, when the case is looked at, it is not an authority at all for the proposition that evidence that a person has committed a specific crime for which he has not been tried, is not admissible to prove that he was leading a dishonest or criminal life; for it appears on an examination of that case that what happened was this: notice had been given by the Director of Public Prosecutions, which was served upon the accused in the ordinary way, that he having been discharged from prison on October 13, 1921, on January 5, 1922, committed the first of the offences for which he was then awaiting trial, and that related to an offence alleged to have been committed on January 5 in that year. Upon the prisoner being called upon to plead, the accused pleaded not guilty to that charge, and the prosecution decided not to proceed with it, in other words admitting that they had no evidence to substantiate the charge that he had committed that offence on January 5. Notwithstanding that admission had been made by the prosecution, evidence was tendered and received in support of the charge that he was a habitual criminal, that he had been present with another man at the time that particular offence was committed. In other words, to support the charge of the accused being a habitual criminal, the prosecution gave evidence leading the jury to believe, or inviting them to believe, that he had committed an offence as to which the

1929.
8 *July.*

ARTHUR WILLIAMS.

Hewart, L.C.J., Avory, J., Swift, J.

prosecution had already admitted they had no evidence to substantiate it. In those circumstances this Court held that that evidence was improperly admitted. The Court never held in that case that if a man has admitted an offence before his trial on the charge of being a habitual criminal, that that evidence is not admissible merely because he made the admission for some particular purpose in his own mind. The admissibility of evidence does not depend upon the purpose which the man has in his mind when he makes a statement or admission; it depends solely on the question of whether that statement is relevant to any issue before the court; and assuming that the admission has not been obtained by improper means, such as by threat or promise by a person in authority, the mere fact that a person has some particular reason for making an admission cannot affect its admissibility in evidence. In this case the learned Recorder having his attention called to this case, and no doubt not having the opportunity of reading the whole report, seems to have relied upon this headnote, and held as a matter of law that, because the accused had made this admission for the purpose of the other offences being taken into consideration when sentence was passed upon him, it was therefore not admissible for the purpose of proving that he was a habitual criminal. If the learned Recorder had had the time or the opportunity to read the report he would have no doubt come to the same conclusion as that which I have expressed with regard to it. We have thought it necessary to make these observations, although the point does not strictly arise for decision under the circumstances of this case, in order that in future that headnote may not mislead others, as it appears to have misled the learned Recorder in this case.

Application dismissed.

T. R. F. B.

HERBERT JOSHUA KEECH.

1929.
8 *July.*

HERBERT JOSHUA KEECH.

Hewart, L.C.J., Avory, J., Swift, J.

Indecent Assault—Age of Female—Belief of Defendant—Sentence.

The Court declines to lay down a general rule concerning sentence in cases under section 2 of 12 & 13 Geo. 5, c. 56, the Criminal Law Amendment Act, 1922, where defendant is acquitted of the major charges therein referred to but convicted of a minor charge.

Observations of the Court on the exclusion by that section, on the minor charge, of a defence open on the major charge.

Appeal against sentence, on certificate.

Appellant was convicted at Hertford Assizes on June 19, 1929, of indecent assault on a girl under sixteen years of age, and was sentenced by Mr. Justice Horridge to one month's imprisonment in the second division; he was on bail.

C. J. A. Doughty (under section 10 of the Criminal Appeal Act, 1907), for appellant: [1]

In this case Herbert Joshua Keech was indicted at the Hertfordshire Assizes on various counts, which fall under two heads: firstly, that of having carnal knowledge of a girl under the age of sixteen years, and under the second head, of indecent assault of the same girl, the facts in both cases being the same. The evidence was that this girl was some fifteen years and three months old, and the appellant some twenty-one years. He met her, and these acts took place. The evidence quite clearly came out at the trial that the girl looked very much older than fifteen years; in fact, her mother's evidence was that at the time these acts took place she would have said that she looked eighteen; and that the appellant at no time knew of the age of the girl, nor could he have had reasonable grounds for so knowing. Your lordships are well aware that that provides a sound defence to the major counts of the indictment, and the jury so found. The learned judge who heard the case saw fit that both the

(1) This report is printed almost *verbatim* from a transcript supplied by the courtesy of the Director of Public Prosecutions.

1929.
8 *July*.

HERBERT JOSHUA KEECH.

Hewart, L.C.J., Avory, J., Swift, J.

classes of charges should be tried at the same time, although I asked to have them tried separately. I do not make any point about that now, because the appeal is not one against conviction, but merely sentence. This Court has on previous occasions referred to the fact that, whereas the appellant may have a perfectly sound defence to the more serious charge, the Court is not bound to acquit him of the minor charge. The last occasion that was referred to was in the case of REGINALD JAMES LAWES, referred to in 21 Cr. App. R., at p. 45. The facts there were somewhat the same. The appellant was charged, upon an indictment containing four counts, with offences against a girl under sixteen years of age, and also an indecent assault upon the girl. In that case he pleaded guilty to the count of indecent assault, and the prosecution did not go on with the other count. In this case he pleaded not guilty to both charges, and was acquitted on the major charge, because his defence was a sound one. The Court in that case mentioned the oversight in the statute which did not allow him to defend the minor charge; therefore, the learned judge, when he summed up to the jury, told them they were obliged to convict him on the minor charge, and they did so. The learned judge referred to the case I have been reading, and said he desired the direction of this Court upon whether, in cases of this kind, the sentence passed was to be only a nominal one, or whether he was at liberty to give a sentence varying in each particular case. With regard to this present case, the man here in Court, according to the evidence below, was of the highest character. He was a man who was twenty-one years of age at the time these offences were committed. He would, had it not been for a recent Act, which came into force in May of this year, have been married to the girl. That was stopped by the Registrar of marriages for the district. He has from that date contributed ten shillings a week towards the support of this girl, who is pregnant, I understand, and is now about to become a mother. He is not a rich man; he is receiving some £100

1929.
8 *July.*

HERBERT JOSHUA KEECH.

Hewart, L.C.J., Avory, J., Swift, J.

a year, working on his own account, so your lordships will appreciate what a strain that is upon his finances; and that is not made on any order of the justices, it is made voluntarily, and paid to the girl's mother; and there never has been the slightest suggestion, so far as one can tell, against him by anybody upon any point whatsoever. Upon those facts I do submit to your lordships that this sentence, which may not be a very heavy one, has been made in consequence of what your lordships yourselves have described as an oversight in the statute; and whereas one cannot appeal against conviction, I do suggest to your lordships that the sentence should be reduced from one of actual imprisonment to either one of nominal imprisonment, or to a binding over.

Tindal Atkinson, for the Crown:

I do not desire to say anything about the particular sentence in this case, but the Director would like me, if your lordships will permit, to offer one or two observations on the case, and particularly on the view that Horridge, J., took of the case of LAWES. My lords, it is submitted that the case of LAWES should not be read as a case binding on all judges, that, in circumstances which arise owing to the difficulties created by this statute, the judge should never be allowed to pass a sentence of imprisonment.

[THE LORD CHIEF JUSTICE: There is nothing in the case of LAWES to justify any such view.]

Tindal Atkinson: The other observation I should like to direct your lordship's attention to is, that in a charge under this section a prisoner, in the absence of a substantive count for indecent assault, cannot be found guilty of indecent assault; he may be found guilty of the attempt, but that is scarcely relevant to circumstances of this kind, and he can, under some old cases, be found guilty of a common assault. The Director wishes me to submit shortly to your lordships that it may be useful, if your lordships thought it right, to indicate in your judgment such a suggestion as that it might be a matter for persons who frame indictments to consider

1929.
8 *July.*

HERBERT JOSHUA KEECH.

Hewart, L.C.J., Avory, J., Swift, J.

whether the circumstances, as disclosed upon the depositions, justify the omission, in a proper case, of the count for indecent assault, so that the case may proceed upon the trial of the major issue, and the verdict be taken on that issue only.

[AVORY, J.: That seems to be encouraging the permanence of this grotesque statute.]

Tindal Atkinson: It is one way, possibly, of avoiding the grotesque results of the statute, if the case is a proper case. I only submit this in the case under discussion—it appeared, if I may respectfully say so, to me, when I read the depositions before the case was tried at all, that it presented the situation of hardship which appeared in the case of LAWES, and which is more carefully dealt with in the case of FORDE, the earliest case that came up under the statute, which is reported in [1923] 2 K. B., p. 400, where Avory, J., in giving the judgment of the Court, commented upon the curious effects of what are obviously rather ill-considered amendments of the main statute. There may be circumstances, which appear on the depositions, which would possibly justify what I may call the deliberate omission from the indictment of the substantive count for an indecent assault. On the other hand, of course, in cases of doubt, or where the facts do not appear so clear on the depositions, the ordinary procedure would be applied, and the count for indecent assault would be added. Those are the only observations I am asked to address to your lordships, in case your lordships thought it right, by way of indication in your judgment, to suggest such a course might be adopted in future in appropriate circumstances.

[SWIFT, J.: Can you tell me, before the statute which took away from everybody the old defence of reasonable ground for believing that the girl was over sixteen, was it usual to add a count for indecent assault?]

Tindal Atkinson: Apparently it was, according to an edition of Archbold, which I happen to have here, which was

1929.
8 *July.*

HERBERT JOSHUA KEECH.

Hewart, L.C.J., Avory, J., Swift, J.

published before the Act, because I find there a suggested direction that you should add a count charging an indecent assault.

[AVORY, J.: But was not that to guard against the possibility of the facts not supporting the full offence. That may be a case where the evidence falls short of the offence of actual carnal knowledge, or even of the attempt, and yet may justify a charge of indecent assault.]

Tindal Atkinson: Yes, my lord.

[AVORY, J.: That was what gave rise to the practice before this statute came in, so surely even now there may be cases under this present statute where it is quite proper to add a count for indecent assault where the facts would not support the charge of the full offence.]

Tindal Atkinson: I quite agree, my lord, there are many cases of that character.

[THE LORD CHIEF JUSTICE: Then the absurdity remains, that if the man were charged with the full offence, and tried for it, the defence of reasonable grounds to believe, etc., might avail him, but not so upon the minor charge.]

Tindal Atkinson: I must confess it is very difficult to meet the difficulties that have been created by this Act of 1922. There is another case following this case, which is an illustration of the degree of sentence which might be passed in certain circumstances. I only mention that to your lordships.

[THE LORD CHIEF JUSTICE: Mr. Doughty, were you present at the trial?]

Doughty: I appeared at the trial on behalf of the prisoner.

[THE LORD CHIEF JUSTICE: Was the attention of the learned judge at the trial directed to the question whether the accused had any *bona fide* desire to marry the girl?]

Doughty: Yes. It came in the mother's evidence on page 6, question 65: "These two would have married by now, if it had not been for the recent Act," etc. (reading to

1929.
8 *July.*

HERBERT JOSHUA KEECH.

Hewart, L.C.J., Avory, J., Swift, J.

the words) "before the Act came into force." It is quite true that there was no actual evidence.

[AVORY, J.: How do you mean "four days before the Act came into force?"]

Doughty: The application was refused on the ground that it was four days before the Act came into force—it must be after.

[AVORY, J.: It may be that the marriage could not take place till after.]

Doughty: I think it was. I had the actual letter from the Registrar before me at the time. It is quite true the winess went on to say: "He has written to me stating," etc. (reading to the words) "he could not be married to her;" but it was quite a month before he changed his mind. The "recent Act" refers to Lord Buckmaster's Act, which prevents a marriage of that sort.

THE LORD CHIEF JUSTICE: This appellant, Herbert Joshua Keech, was charged at Hertfordshire Assizes on an indictment containing six counts, charging him in three of the counts with having had carnal knowledge on two occasions in October, and on a third occasion on November 7 last, of Lily Daisy Bird, a girl under the age of sixteen years, and, in the remaining count, of having on the same days, and at the same time, indecently assaulted her. The appellant was acquitted on the counts charging him with having carnal knowledge, but he was convicted on the count for indecent assault. In the result, he was sentenced to one month's imprisonment in the second division, and was released on bail. The appellant now appeals against sentence, with the leave of the learned judge. The learned judge has granted leave in the form of a certificate, in which he states as his ground: "That I should wish to have the direction of the Court of Criminal Appeal whether, having regard to the case of THE KING *v.* LAWES in 21 Cr. App. R., p. 45, a judge ought never to pass a more than nominal sentence in cases

1929.
8 *July.*

HERBERT JOSHUA KEECH.

Hewart, L.C.J., Avory, J., Swift, J.

where there is a conviction for indecent assault, but where the defence of belief in the age of the girl is an answer to the charge of carnal knowledge." The question which is raised turns upon a provision of the Criminal Law Amendment Act, 1922. By section 2 of that Act it is provided that "reasonable cause to believe that the girl was of or above the age of sixteen shall not be a defence to a charge under sections 5 and 6 of the Criminal Law Amendment Act, 1885, provided that in the case of a man of twenty-three years of age or under, the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section." The various respects in which that legislative provision seems to provoke criticism have been referred to more than once; in particular in the case of THE KING *v.* F. M. A. FORDE, [1923] 2 K. B. 400; 92 L. J. K. B. 501; 27 Cox, C. C. 406; 128 L. T. 798; 87 J. P. 76; 67 S. J. 539; 17 Cr. App. R. 99; 39 T. L. R. 322, and THE KING *v.* LAWES, 21 Cr. App. R., p. 45. There is nothing to be subtracted from the criticisms that are there offered upon this amazing legislation, and, obviously, there is nothing that can be added to them. But the particular question which the learned judge asks, or seeks to raise, in the present case, is not a question to which those cases afford an obvious answer. What he is inviting is a direction whether a judge ought never to pass a more than nominal sentence in cases of that kind. There is nothing in the case of LAWES, as there is nothing in the case of FORDE, which lays down any sort of universal rule. These cases, and cases of the kind, are not to be treated as an indistinguishable group of identical cases. Every case must depend upon its own facts, and the law, with all its imperfections, must be applied separately and carefully to the facts of the particular case. The initial absurdity of permitting a particular defence in the case of a major charge, where that defence is not open upon a minor charge involved in the major charge, is obvious enough, and yet there may be cases in which

1929.
8 *July.*

HERBERT JOSHUA KEECH.

Hewart, L.C.J., Avory, J., Swift, J.

a person may be properly convicted of the minor charge, where he could not be properly convicted of the major offence. It would be not merely idle, but misleading, to attempt to lay down a simple rule, applicable without discrimination, in all cases where indecent assault is charged, and the age of the prisoner is within the limit. Every case, as it seems to us, must be separately considered.

Looking at the particular facts of this case, now that we know all of them, we do not see that any good purpose will be served by sending this young man to prison for a month. We have come to the conclusion, having regard to all the circumstances, that in the case of this appellant, who was twenty-two years of age on April 5 of this year, and has never been charged with any kind of offence before the date of the present charge, the appropriate sentence upon him in the circumstances is that he be imprisoned for one day; which means that he is now discharged.

Sentence reduced.

1929.
8 *July.*

JOHN BLACKMAN.

Hewart, L.C.J., Avory, J., Swift, J.

JOHN BLACKMAN.

Indecent Assault—Sentence.

[See last headnote.]

Appeal against sentence, on certificate.

H. J. Baxter, for the appellant: [1]

The appellant was indicted at Maidstone Assizes on June 24 before Mr. Justice Horridge on two counts: first, that he had carnal knowledge of a girl under sixteen, and the second count of indecently assaulting her. The facts were the same for the two counts. He pleaded not guilty to the more serious offence and pleaded guilty to the second count, and on that the prosecution decided not to proceed with the major

(1) This report was kindly supplied by the Director of Public Prosecutions.

1929.
8 *July.*

JOHN BLACKMAN.

Hewart, L.C.J., Avory, J., Swift, J.

charge. If that charge had been proceeded with he would have used the defence which your Lordships have been discussing, provided by the Criminal Law Amendment Act of 1922; but that, of course, did not provide any defence to the minor charge. The fact that the prosecution accepted his plea of not guilty shows, I submit, that he had reasonable cause to believe that the girl was over sixteen.

[SWIFT, J.: If her story is true, what did it matter whether he believed she was over sixteen or not; there was an attempted rape, according to the depositions?]

Baxter: He was not charged, of course, with attempted rape. It may be that unwisely he took advice in pleading guilty to this charge, because unfortunately he then was not entitled to bring into issue the facts shown on the depositions, but had the case been fought out there would have been a serious conflict of evidence, because in my submission the girl consented throughout to the assault which he is charged with having committed.

[THE LORD CHIEF JUSTICE: If there was consent—how old is this girl?]

Baxter: Fifteen years and ten months. The doctor's evidence was that the girl looked over sixteen—that he would have thought she was sixteen.

[THE LORD CHIEF JUSTICE: It would be a very serious thing if, until this statute is amended or repealed, this state of affairs were to arise: that when a man is charged with the more serious offence he expresses his willingness to plead guilty to the minor ofience, that that plea of guilty is accepted, and that thereupon he receives only a nominal sentence as a matter of course. That would be all wrong, would it not?]

[AVORY, J.: Even in a case where there is evidence that the girl was not consenting.]

Baxter: Yes; but the evidence was never seriously put in issue, because he did plead guilty.

[SWIFT, J.: Supposing he had only been indicted for

1929.
8 *July.*

JOHN BLACKMAN.

Hewart, L.C.J., Avory, J., Swift, J.

indecent assault on this girl—supposing he had been indicted for nothing but indecent assault and pleaded guilty on that, you would not say that three months is too long a term for that assault, would you?]

Baxter: No. I am afraid that the advice he was given went too much on LAWE'S CASE, in which I assumed, wrongly, that as your Lordships had reduced it in one case, a nominal sentence would be imposed in view of what your Lordships said: that this was a grotesque state of affairs.

[THE LORD CHIEF JUSTICE: But the acts that were done in this case did not follow from that grotesque state of affairs; they followed from the uncontrolled passion of this appellant.]

[SWIFT, J.: Of course, no evidence was given; he pleaded guilty. You do not give evidence when a man pleads guilty; you look at the depositions and see what was said in the Police Court, and then you listen to counsel for the defence.]

Baxter: Theoretically, counsel for the defence had an opportunity of putting the story, but I was unable to proceed very far with the story.

[AVORY, J.: In fact, apparently, you did not ask for leave to call the girl and ask her any questions. That might have influenced the learned Judge in his sentence.]

Baxter: No, my Lord. I omitted to do that. I did just state what I am stating now: that my instructions showed that the girl's story was incorrect in many of the details.

[AVORY, J.: And that is all you said.]

Baxter: Yes; although I agree that the appellant was guilty of an offence, in pleading guilty it must not be assumed that all the details were accepted. I will ask the court to say that this case is covered by the principle you have already stated in THE KING *v.* LAWES and in the last case.

H. W. Wightwick, for the Crown.

THE LORD CHIEF JUSTICE: This appellant, John Blackman, was indicted at Maidstone Assizes, first of all for carnally knowing Lilian Edith Lambert under the age of sixteen, on

1929.
8 *July*.

JOHN BLACKMAN.

Hewart, L.C.J., Avory, J., Swift, J.

June 2, 1929, and secondly, with indecently assaulting her on the same day. The appellant pleaded guilty to the second count of that indictment and was sentenced to three months' imprisonment with hard labour. He was released on bail, and he now appeals against his sentence with the leave of the learned judge, who states that his reasons for giving leave are the same as those stated in his certificate in the case of KEECH.

This case, and the facts of this case, illustrate the observation which we thought it right to make in the case of KEECH: the observation, namely, that every one of these cases must be separately considered upon its particular facts in relation to the law. There is no possibility of applying some universal measure of punishment or leniency to them. This statute, the Criminal Law Amendment Act of 1922, in this part of it, is sufficiently bad, but it would be indescribably worse if it were to lead to the view that, since it has been passed, nobody can properly be punished for an indecent assault if he is under the age of twenty-three.

In this case the appellant, who is nineteen years of age, met this girl of fifteen, and after a time took her away to a field, where he pulled her to a lying position, and tried to pull her clothes up. She pushed him away and tried to get up, but he held her down and pulled down her knickers. She shouted, but he told her not to shout, and then he had connection with her. Then, according to the evidence before the justices, she felt faint, and at first could not stand up. He told her not to tell anyone what had happened, and to tell her mother that she had lost herself. As the girl did not come home at ten o'clock that night her mother went out to look for her. On her return she found her in bed, and saw that her clothes were in a filthy condition. The learned judge in passing sentence in this case said: "I propose to pass a sentence of three months' hard labour. It seems to me that this man met this girl for the first time, and he took her off into this place. She was under sixteen, and he indecently assaulted

1929.
8 *July*

JOHN BLACKMAN.

Hewart, L.C.J., Avory, J., Swift, J.

her, if the facts which she details are true, in very bad circumstances indeed. In any case he took her to this place with the intention of indecently assaulting her, and did so, and kept her out till late at night. In all the circumstances of the case I think the term of three months is short enough." This Court thinks so too, and the appeal is dismissed.

Appeal dismissed.

JOHN O'BRIEN.

1929.
8 *July.*

JOHN O'BRIEN.

Hewart, L.C.J., Avory, J., Swift, J.

Threatening to Murder—Sentence.

Severity of Sentence.

Appeal against sentence.

Appellant pleaded guilty at Middlesex Sessions on June 8, 1929, to sending a letter threatening to murder, and was sentenced by the Chairman to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

AVORY, J.: The appellant is only twenty-six years of age. He married his present wife in 1924. On two occasions he left her, and she obtained a separation order against him, but subsequently they were reconciled and lived together again. On April 6, 1929, he again left her, and she again took out a summons for a separation order. There is some evidence that he had threatened her before he wrote the letter in question. The letter asked her to bring their two children to a certain place and added that, if she did not, he would hang around the place where she was living and murder the three of them. In view of the fact that there is nothing previously recorded against the appellant, the Court has come to the conclusion that the sentence may properly be reduced to one of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

ALFRED THOMAS WOODWARD.

1929.
8 *July.*

ALFRED THOMAS WOODWARD.

Hewart, L.C.J., Avory, J., Swift, J.

Previous Convictions—Sentence to Penal Servitude—Value of Goods Obtained Dishonestly in Relation to Sentence.

The mere fact that a prisoner has been previously convicted is not necessarily a ground for inflicting a severe sentence for dishonestly obtaining goods of small value.

Appeal against sentence.

Appellant pleaded guilty at Staffordshire Sessions on June 18, 1929, to obtaining money and food by false pretences, and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

No counsel appeared for Crown.

THE LORD CHIEF JUSTICE: The total value of the goods and money obtained as the result of the two offences charged in the indictment, and of four other offences which were taken into consideration, was £5 0s. 6d. The appellant has been previously convicted six times, although he is only thirty-one years of age, and has still a *remanet* of a sentence of three years' penal servitude to serve. This Court has said again and again, and now repeats, that in passing sentence regard must be had to the intrinsic nature of the offence proved. It is entirely wrong to send a man to a long term of imprisonment or penal servitude merely because he has received heavy punishment at some other time for some other offence. This sentence cannot be supported, and we reduce it to a sentence of nine months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

1929.
8 *July.*

JOHN HENRY SMITH.

JOHN HENRY SMITH.

Hewart, L.C.J., Avory, J., Swift, J.

Previous Convictions—Sentence to Penal Servitude—Value of Goods Obtained Dishonestly in Relation to Sentence.

The mere fact that a prisoner has been previously convicted is not necessarily a ground for inflicting a severe sentence for dishonestly obtaining goods of small value.

Sentence reduced (partly) on the ground of defendant's youth.

Appeal against sentence.

Appellant pleaded guilty at Staffordshire Sessions on June 18, 1929, to shopbreaking and larceny and was sentenced by the Chairman to two years' imprisonment with hard labour.

Appellant in person.

No counsel appeared for Crown.

THE LORD CHIEF JUSTICE: The appellant is twenty-one years of age, and he has been convicted four times of larceny and shopbreaking, and once of assault, but the most severe sentence he has received hitherto is one of six months' imprisonment. In the present case four watches of the total value of 23s. 6d. were stolen, and the actual breaking of the window was done by another man. In our opinion, a sentence of two years' imprisonment with hard labour on a youth of twenty-one, whose record and whose offence are of the kind described, is excessive. We say again what we said in the last case: regard must be had to all the circumstances of the case, and not least to the intrinsic gravity of the offence itself. We reduce the sentence to one of nine months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

RALPH PATTISON.

1929.
15 *July.*

Voluntary Statement—Confession—Part only after "Caution."

The fact that an accused person makes a voluntary confession without "a caution" does not exclude its admissibility at the trial.

DOHERTY, 13 Cox C. C. 23 distinguished.

Application for leave to appeal against conviction.

Prisoner was convicted of murder at Maidstone Assizes on June 25 and was sentenced to death by Mr. Justice Horridge.

B. H. Waddy, for the applicant (under section 10 of the Criminal Appeal Act, 1907, who was present, submitted that part of a voluntary incriminating statement by prisoner had been wrongfully admitted by the learned judge at the trial; he had excluded the opening part thereof because it was only at that point that the police officer to whom the statement was made "cautioned" the prisoner; he cited DOHERTY, 13 Cox C. C. 23, 1874: Donegal Assizes *Cur.* Whiteside, C.J., as an authority that if any part of a statement is excluded the whole must be.

Clifford Middleton, for the Crown, was not called upon.

THE LORD CHIEF JUSTICE: In that case the prisoner's statement was excluded because there was an inducement by a constable in authority to confess; in this case nothing of the sort is suggested. The learned judge at the trial recommended that the prisoner's words before the "caution" should not be read, but this was *ex abundantia gratiæ* and not as a matter of law. The statement was voluntary.

Application dismissed.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

1929.
22 *July.*

WALTER MONTGOMERY.

Bigamy—Attempted Suicide—Consecutive Sentences.

Severity of Sentence for attempted suicide.

Application for leave to appeal against sentences.

Applicant pleaded guilty at the Central Criminal Court on July 1, 1929, to bigamy and attempted suicide and was sentenced by the Recorder to twelve months' imprisonment in the second division, and three months' imprisonment in the second division, the sentences to run consecutively.

No counsel appeared, and the applicant was not present.

THE LORD CHIEF JUSTICE: There is no reason for interfering with the sentence for bigamy, but with regard to the sentence for attempted suicide other considerations apply. It is not usual to give a consecutive sentence for an attempt to commit suicide, and here it appears that the attempt at suicide was caused by remorse on the part of the applicant for having contracted the bigamous marriage. There is a clear precedent in the reported cases for reviewing a consecutive sentence, where it appears that the sentence should not be consecutive, and we have come to the conclusion that this sentence for attempted suicide should not be consecutive to, but concurrent with, the sentence for bigamy. The sentences will run from the date of conviction.

Sentence reduced

T. R. F. B.

PATRICK SEARLE, JAMES DALE, SIDNEY MAYO, GEORGE NEWMAN.

1929.
22 *July*.

PATRICK SEARLE.
JAMES DALE.
SIDNEY MAYO.
GEORGE NEWMAN.

Hewart, L.C.J., Avory, J., Branson, J.

Prisoners Jointly Indicted—Discriminating Sentences.

Sentences on persons jointly convicted should discriminate between their respective antecedents.

Appeals against sentence, by leave of the Court.

Appellants were convicted at Hertford Assizes on June 19, 1929, of shopbreaking and larceny, and each was sentenced by Mr. Justice Horridge to three years' penal servitude.

Appellants in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: In addition to the offences to which the appellants pleaded guilty, nineteen other cases, in which the appellants admitted their guilt, were taken into consideration. The total value of the property stolen is not stated, but in two cases safes were stolen and in every case a motor-car was used. The difficult question arises, what the sentences should be. Crimes of this sort are undoubtedly prevalent, and presuppose no little courage and skill on the part of the criminal.

Searle was stated at the trial to be twenty-three years of age, and has been previously convicted once. In his notice of appeal he says that he is only nineteen years eight months of age. This Court has caused inquiries to be made, with the result that it does appear that the appellant was born in 1909. The Court has also made inquiries with regard to his suitability for Borstal treatment, and the report states that he is medically fit, and otherwise suitable. In his case the sentence of three years' penal servitude is quashed, and a sentence of three years' detention in a Borstal institution substituted.

1929.
22 *July*.

PATRICK SEARLE.
JAMES DALE.
SIDNEY MAYO.
GEORGE NEWMAN.

Hewart, L.C.J., Avory, J., Branson, J.

With regard to Dale, he is twenty-three years of age and has not been previously convicted. He is not of a suitable age to be sent to Borstal, but it appears to us that in his case a sentence of three years' penal servitude was not warranted, and it is reduced to a sentence of twelve months' imprisonment with hard labour.

The appellant Mayo is thirty-five years of age, and in 1911 he was bound over for uttering counterfeit coin. He has not been since convicted. In the opinion of the Court the sentence in his case should be reduced to one of fifteen months' imprisonment with hard labour.

The appellant Newman is twenty-six years of age. He was bound over for larceny some years ago, and in February, 1928, he was sentenced to imprisonment for being found by night in possession of housebreaking implements. The Court sees no reason for interfering with the sentence in his case.

The result is that the four appellants will be released at different dates, a result which is in itself desirable. In each case the sentences will run from the date of conviction.

Sentences of three appellants reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

ARTHUR WALLACE.

1929.
29 *July.*

Application granted—Appeal heard at once—Larceny—Severity of Sentence.

The Court may deal at once with an appeal against sentence, for which it has granted leave.

Severity of sentence after many previous convictions.

Appeal against sentence by leave of the Court, granted on application for extension of time made previously at the same sitting.

Appellant was convicted at West Sussex Sessions on June 27, 1929, of pavilion-breaking and larceny, and was sentenced by the Chairman to three years' penal servitude.

No counsel appeared, and the appellant was not present.

THE LORD CHIEF JUSTICE: The value of the goods stolen in this case was only £4 15s. The appellant appears to have made a habit of pavilion-breaking and he has been sentenced for that offence in 1915, 1917, 1919, 1921, 1923, 1926 and 1928. It is quite obvious that when in want of food he breaks into a club pavilion to get what he can. He had been released from prison only four days when he committed this offence, and he stated that he had been without food for forty hours. Looking at all the circumstances of the case, including the value of the stolen property, we think that a sentence of three years' penal servitude is excessive, and we reduce it to one of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

1929.
29 *July.*

GERALD CURRIE KITCHING.

Hewart, L.C.J., Avory, J., Branson, J.

GERALD CURRIE KITCHING.

First trial or hearing a Nullity—Autrefois acquit—*Retrial or Second Hearing—Sentence Severer than on first Hearing.*

When this Court has quashed a conviction on the ground that the hearing below was a nullity, defendant indicted again on the same charge cannot plead *autrefois acquit*, but in such a case, *semble*, the Court leans against a sentence severer than that first imposed.

See p. 116 above.

Appeal against conviction and application for leave to appeal against sentence.

Appellant was convicted at Westmorland Sessions on July 6, 1929, of indecent assault on a female, and was sentenced by the Deputy-Chairman to two years' imprisonment with hard labour.

W. O. Stern, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

At the trial a plea of *autrefois acquit* was filed on behalf of appellant, but the jury found for the Crown. Appellant had been charged with rape at Westmorland Assizes. The Grand Jury there returned the bill endorsed "No true bill for rape. True bill for indecent assault (aggravated)." The trial then proceeded as if an indictment for indecent assault had been presented. Appellant was convicted, the record of conviction and sentence being entered on the original bill. This Court quashed that conviction. It is submitted that appellant was in jeopardy during the proceedings at the Assizes, and that the plea of *autrefois acquit* should have succeeded. *Vaux*, 4 Co. Rep. 44b (1590) is an authority against this submission, but the correctness of that decision has been doubted; 2 Hale's Hist. P. C. 248, 394. Further, the sentence is excessive. At the Assizes he received a sentence of twenty months' imprisonment with hard labour, and he has remained in custody ever since.

G. J. Lynskey, for the Crown, was not called on.

1929.
29 *July.*

GERALD CURRIE KITCHING.

Hewart, L.C.J., Avory, J., Branson, J.

THE LORD CHIEF JUSTICE [1]: This appellant, Gerald Currie Kitching, was convicted on July 6 last at Westmorland Sessions on an indictment for indecently assaulting Emily Taylor. A plea of *autrefois acquit* was filed; the appellant, however, was convicted, and was sentenced to two years' imprisonment with hard labour. He now appeals against that conviction and applies for leave to appeal against the sentence.

Apparently the appellant has drafted his own grounds of appeal. He refers very vaguely, if at all, to the only real question, namely, the question of *autrefois acquit*, but he does in the last paragraph but one use the word "jeopardy," and that sounds like a reminiscence of the legal argument at the trial. With regard to this appeal, on June 3 of this year a bill of indictment, containing one count only charging the appellant with committing rape on Emily Taylor, was presented to the Grand Jury at Westmorland Assizes. The Grand Jury found no true bill for rape, and a true bill for indecent assault—aggravated. No further bill of indictment was sent up, but upon that document the appellant was tried and was convicted as if there had been an indictment for indecent assault. The appellant was then sentenced to twenty months' imprisonment with hard labour. He appealed to this Court, and on June 24 last this Court allowed the appeal and quashed the so-called conviction but declined to make any further order, and in particular did not direct a judgment and verdict of acquittal to be entered. Having been discharged from custody by this Court, the appellant was immediately re-arrested and was charged at Kendal Police Court with indecently assaulting Emily Taylor, and he was committed for trial at the Westmorland Sessions held at Kendal a few days later. When those Sessions came on the appellant, as I have said, filed a plea of *autrefois*

(1) This judgment is printed from a transcript supplied by the courtesy of the Director of Public Prosecutions.

1929.
29 *July.*

GERALD CURRIE KITCHING.

Hewart, L.C.J., Avory, J., Branson, J.

acquit, issue was joined thereon, the jury was summoned to try that issue and returned a verdict for the Crown. The appellant was then allowed to plead over, and evidence was given, and in the result the jury returned a verdict of guilty. In these circumstances the only point of substance which is raised before us is that the plea of *autrefois acquit* was good. The case is really too plain for argument. This appellant never was in peril; he was being tried upon a bill which was found to be no true bill. It is quite true that afterwards the subsequent events of that trial were recorded upon the face of that document as if it had been a true bill for something. We came to the conclusion that those proceedings were a nullity, and in truth and in fact there was no time at which this appellant was in peril upon that self-contradicting document.

With regard to the present case the evidence was quite clear, and there is no reason to interfere with the conviction. With regard to the sentence, however, other considerations seem to apply. This appellant was sentenced on June 3 last to twenty months' imprisonment with hard labour. He had at that time been in custody for a little over three months, and no doubt the learned judge took that fact into consideration. The appeal was heard on June 24; the appellant was immediately re-arrested, and on July 6, that is to say, four weeks after the day on which the original sentence was passed, the appellant was sentenced to two years' imprisonment with hard labour, which is the maximum sentence for this offence. We think that that sentence ought to be re-considered and that the original sentence ought to be substituted for it, that is to say, twenty months' imprisonment with hard labour, commencing from June 3 last. Subject to that reduction of sentence, this appeal is dismissed.

Sentence reduced.

T. R. F. B.

ARTHUR ALBERT DRAPER.

1929.
29 *July*.

ARTHUR ALBERT DRAPER.

Hewart, L.C.J., Avory, J., Branson, J.

Incest—Age of Female—Accomplice—Corroboration—Charge to the Jury.

If on any of the material dates alleged in an indictment for incest the female has reached the age of sixteen, she may be liable as an accomplice and, therefore, if she is a witness she must be corroborated.

It is a misdirection in such a trial to tell the jury that they must first decide whether they believe such a female witness; they should be instructed not to make up their minds until they find that she is corroborated.

Appeal against conviction, by leave of the Court.

Appellant was convicted at the Central Criminal Court on June 28, 1919, of incest, and was sentenced by Swift, J., to twelve months' imprisonment.

E. F. J. Peregrine, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present, was not called upon.

G. B. McClure, for the Crown, did not seek to support the conviction.

MR. JUSTICE AVORY: The appellant was charged with incest with his sister, the offences charged being alleged to have taken place on December 22, 1928, and on some date between October 1 and October 31, 1928. At those dates the girl was over sixteen years of age, and therefore under the statute was herself liable to be charged with permitting the offence, and accordingly was an accomplice in its commission. In those circumstances, it was essential that the jury should be properly warned not to act on her testimony, unless they found that kind of corroboration which over and over again has been laid down as being necessary, namely, independent evidence implicating the accused. The judge, in his summing-up in this case, omitted any reference to the fact that the girl was over sixteen and was, therefore, an accomplice whose evidence required that kind of corroboration. Further, in the course of his summing-up, he more

1929.
29 *July*.

ARTHUR ALBERT DRAPER.

Hewart, L.C.J., Avory, J., Branson, J.

than once used an expression which, in the opinion of this Court, may have misled the jury; he said that what they had to do was, in the first place, to make up their minds whether they believed the girl's evidence, and then ask themselves was there anything else in the case which confirmed her story. The jury should have been warned not to believe an accomplice, unless they find other independent evidence implicating the accused.

The appellant here, when first accused, made an emphatic denial and the only suggested corroboration of the girl's story was an alleged conversation between the appellant and his mother in the presence of his wife. The mother, who was admittedly deaf, said that in the course of the conversation the appellant had used the expression: "It did occur once in October." The appellant denied that he had ever used that expression, and his wife was called into the box as a witness for the defence. In the opinion of this Court, there may well have been a misapprehension in her mind, and she may have left the box without giving evidence, as she did, because she was under the impression that she was entitled to be there only if she was prepared to give evidence against the accused, and this may have prejudiced the jury against the accused. There is one other matter which affects the mind of this Court. The appellant said that on December 22 his mother was at home ill in bed. The girl swore that she was alone in the house on that occasion. From answers given by the mother, it appears reasonably probable that, when she said she was not at home that day, she was mistaken, because on other occasions in her evidence she admitted that she was.

In all the circumstances the Court has come to the conclusion that this verdict is unsatisfactory, and cannot be supported, having regard to the evidence. The conviction is, accordingly, quashed.

Conviction quashed.

T. R. F. B.

ROBERT FLEMING.

1929.
29 *July.*

ROBERT FLEMING.

Hewart, L.C.J., Avory, J., Branson, J.

Jury Disagreeing—Fresh Jury—Threat not to grant Bail—Inadmissible Evidence of Defendant's Bad Character Volunteered.

If a jury, unable to agree, has announced in open court, and therefore in presence of the jurors in waiting, the numbers of their members for and against a conviction, it is wrong to proceed with the second trial before such jurors. Even if there is no other jury available the Bench ought not to threaten to deprive accused of bail, unless he will consent to be tried by those jurors.

Inadmissible evidence of accused's bad character volunteered by a witness may invalidate a conviction.

Appeal against conviction, by leave of the Court.

Appellant was convicted at Durham County Quarter Sessions on July 1, 1929, of larceny and breach of recognisances, and was sentenced by the Chairman to two consecutive terms of six months' imprisonment with hard labour.

Appellant in person.

Hylton Foster, for the Crown, did not seek to support the conviction.

THE LORD CHIEF JUSTICE: The appellant was tried twice. At the first trial the jury disagreed, and when they came back into Court the foreman said: "We cannot agree; seven of us think he is guilty and five not guilty." That jury was then discharged, and another jury was at once called into the jury-box. Counsel for the defence objected on the ground that the fresh jurors had been present in Court during the previous trial and also had heard in what way the first jury were divided. The Chairman said that the only alternative would be to adjourn the case till the next sessions, as there was no other jury available, and he said to the defending counsel: "If you object, it will be at some public expense, because the prisoner has to be kept where he is till next

1929.
29 *July*.

ROBERT FLEMING.

Hewart, L.C.J., Avory, J., Branson, J.

sessions. His bail is discharged and he will not be out on bail." In fact, the accused had previously been out on bail in his own recognisances.

In the course of the trial, this incident occurred. A police officer had given evidence that at about 10.40 p.m. on April 26 he saw the accused coming out of an entrance carrying a sack, and he said that he stopped him and asked him what the sack contained and the accused replied, "Just coal." In answer to a question in cross-examination, the officer replied, "There were suspicious circumstances when I saw him—the time of night and the man." That was entirely wrong, and was nothing short of a volunteered attack on the prisoner.

In the circumstances the conviction cannot stand. The appeal is allowed, and the conviction quashed.

Conviction quashed.

T. R. F. B.

THOMAS KELLY.

1929.
29 *July.*

THOMAS KELLEY.

Hewart, L.C.J., Avory, J., Branson, J.

Rape—Verdict Against the Weight of Evidence—Undefended Prisoner —No Corroboration.

The Court, disagreeing with the court below on the existence of corroboration, recommends that persons accused of rape should be defended by counsel.

Appeal against conviction and sentence, by leave of the Court.

Appellant was convicted at Liverpool Assizes on June 25, 1929, of rape and was sentenced by Charles, J., to seven years' penal servitude.

G. J. Lynskey, for the appellant (under section 10 of the Criminal Appeal Act), who was present, was not called on to argue.

Maxwell Fyfe, for the Crown.

THE LORD CHIEF JUSTICE: The appellant lodged at a café at St. Helens, and the case for the prosecution was that he had ravished the wife of the manager. The evidence sought to show that the offence was committed about 10 p.m. in the scullery of the café. There was no evidence of any screams heard, nor was there any sign of disorder in the room, and the only mark of violence of any sort on the woman was a bruise on the elbow. When her husband returned, after what she subsequently represented as a prolonged and violent struggle, all she said was, "Kelly has been messing me about; he had better not stop here to-night." The appellant alleged that the prosecutrix frequently invited and enticed him to have intercourse with her. There was evidence of levity, to say the least of it, in the relations between the prosecutrix and the appellant.

There are only three further observations to be made. One is that the appellant was not defended by counsel in the

1929.
29 *July*.

THOMAS KELLEY.

Hewart, L.C.J., Avory, J., Branson, J.

court below and it always seems a pity, in a case of rape, that a prisoner should not be defended. Secondly, he inadvertently put his own character in issue, and his criminal record was then brought out, and it may well be that the jury convicted him on that. Finally, the jury were told that here there was ample corroboration of the story told by the prosecutrix, no particulars being given. It is difficult to see where corroboration can be found.

In the opinion of this Court, this verdict cannot be supported on the evidence. The appeal is allowed, and the conviction quashed.

Conviction quashed.

T. R. F. B.

WALTER PRITCHARD.

1929.
29 *July*.

WALTER PRITCHARD.

Hewart, L.C.J., Avory, J., Branson, J.

Proceeds of Larceny — Partial Restitution by Prisoner — Sentence Increased below for want of fuller Restitution.

The Court does not approve of a sentence being increased because (after a postponement) prisoner has failed to make fuller restitution.

Appeal against sentence.

Appellant was convicted at the County of London Sessions on June 25, 1929, of knowingly receiving stolen goods, and was sentenced by the Deputy-Chairman to six months' imprisonment with hard labour.

Appellant in person.

L. M. May, for the Crown.

THE LORD CHIEF JUSTICE: The appellant is forty-six years of age, and has never been previously convicted. He has been employed as a barman in many hotels and else-

1929.
29 *July.*

WALTER PRITCHARD.

Hewart, L.C.J., Avory, J., Branson, J.

where. He apparently pledged some of the stolen property for £2 10s. and subsequently handed the pawn-ticket to the owner of the property. On April 9, 1929, the Deputy-Chairman said he would postpone sentence till the next sessions. On April 23 the appellant was brought up for sentence, and it was stated that about £13 10s. worth of the stolen property was still missing. The Deputy-Chairman then said: "I am going to postpone sentence for two months, and I shall expect to hear that you have been working sufficiently well to be able to pay back £13 10s. to the owner of the property. If I receive a satisfactory report on you I shall then put you on probation." On June 25 the probation officer stated that the £13 10s. had not been paid back, and that he had found work for the appellant at Croydon, but that the appellant complained that it was too heavy. The owner of the stolen property said that she was sorry for the appellant, and had taken him in as a lodger into her house, and that she expected to be paid when the appellant got work.

The sentence of imprisonment was passed, apparently, because in the interval during which sentence had been postponed the appellant was not able to earn and pay back the sum of £13 10s. That is not a satisfactory course, and we think that the proper course is to substitute the sentence which on April 23 occurred to the mind of the Deputy-Chairman as being appropriate. The appellant will be bound over in his own recognisances in the sum of £10 for two years.

Sentence reduced.

T. R. F. B.

1929.
29 *July.*

DUNCAN MACDONALD.

Hewart, L.C.J., Avory, J., Branson, J.

DUNCAN MACDONALD.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty at Manchester Assizes on July 3, 1929, to committing acts of gross indecency with male persons, and was sentenced by Macnaghten, J., to three years' penal servitude.

No counsel appeared, and the appellant was not present.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty to an indictment containing three counts, all the offences charged being committed about the same time. In our opinion, this is not a case where the provisions of the Penal Servitude Act, 1926, should have been applied. The appellant is sixty-five years of age, and has been twice previously convicted, the last conviction being in 1912. The sentence calls for review, and we reduce it to one of six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BRENDAN EDWARD MULLINGER, CECIL STRINGER, JAMES LAWRENCE CRABB.

1929.
30 *July*.

BRENDAN EDWARD MULLINGER.
CECIL STRINGER.
JAMES LAWRENCE CRABB.

Hewart, L.C.J., Avory, J., Branson, J

Prisoners Jointly Indicted—Different Antecedents—Discrimination in Sentences.

Sentence mitigated in view of appellant's youth and better record than those of his co-prisoners.

Two applications for extension of time to appeal against sentence, and appeal (Crabb's) against sentence, which were heard together.

These three men, who appeared in person, pleaded guilty at York City Sessions on June 24, 1929, to office-breaking and shop-breaking, and each was sentenced by the Chairman to three years' penal servitude; they were all between twenty-three and twenty-four years of age.

E. C. Chappell, for the Crown.

THE LORD CHIEF JUSTICE: In each case request was made that a number of other cases should be taken into consideration when sentence was passed. The appellant Crabb, however, points out that there were not nearly so many other charges against him as there were against Mullinger and Stringer. He is twenty-three years of age, and admitted five other offences in addition to those charged in the indictment, the first offence being on December 31, 1928. In these circumstances we think that the sentence in his case ought to be reduced to one of eighteen months' imprisonment with hard labour.

With regard to Mullinger, he admited his guilt in twenty-five other cases, and Stringer admitted no fewer than thirty-seven other offences. These offences began so far back as

1929.
30 *July*.

BRENDAN EDWARD MULLINGER.
CECIL STRINGER.
JAMES LAWRENCE CRABB.

Hewart, L.C.J., Avory, J., Branson, J.

1924. The position of these two applicants seems to be entirely different to that of Crabb, and in their case there is no reason for granting extension of time for leave to appeal.

Sentence on one appellant reduced.

T. R. F. B.

1929.
30 *July*.

WILLIAM UPTON.

WILLIAM UPTON.

Hewart, L.C.J., Avory, J., Branson, J.

Severity of Sentence—Remanet.

Any sentence (of imprisonment) ought to take into consideration the existence of a *remanet* to be served.

Appeal against sentence.

Appellant pleaded guilty at Middlesex Sessions on July 6, 1929, to house-breaking, and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant is forty-four years of age, and he has been previously convicted five times for house-breaking and larceny. He was released from his last sentence on licence on November 7, 1928, and the evidence of the police was that, since that time, he had worked well for his father till two weeks before his arrest. His father did not like the police visiting the premises, and told the appellant to leave. The Chairman, in passing sentence, said that he knew the appellant had a *remanet* to serve from his previous sentence, and added: "We are not supposed to take any notice of that." That statement involves some confusion

of thought. A *remanet* has to be served after whatever sentence is passed, but it does not follow that it should not be taken into consideration. In all the circumstances, we think this sentence should be reduced to one of nine months' imprisonment with hard labour.

1929.
30 *July.*

WILLIAM UPTON.

Hewart, L.C.J., Avory, J., Branson, J.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE BRANSON.

JAMES CHARLES BENNEWITH.

1929.
8 *August.*

Severity of sentence.

Appeal against sentence.

The appellant was convicted at the Central Criminal Court on July 9, 1929, of garage-breaking and was sentenced by the Recorder to four years' penal servitude.

The appellant, appearing in person, said that only once before had he been in prison, and that there were before the Court various letters from people for whom he had done carting work.

THE LORD CHIEF JUSTICE: The appellant was charged with two others, one of whom was acquitted. It appeared that the appellant and his associates used a stolen car, of which the number had been changed and the body repainted,

1929.
8 *August.*

JAMES CHARLES BENNEWITH.

Hewart, L.C.J., Swift, J., Branson, J.

to carry away stolen property from the premises into which they had broken and entered. At the garage where the car was kept were found house-breaking implements and a number of labels, etc., which identified them with various shop-breaking offences. The record showed that the appellant had been bound over in January, 1926, for shop-breaking and that later in the same year he had been sentenced to six months' imprisonment for obtaining by false pretences and breach of his recognisances. Since that time he had not been charged. Appellant must understand that these offences were of a grave character and were unhappily very prevalent. This would be the last occasion on which he would receive leniency, but owing to his age—thirty-two—and his record, the Court would substitute a sentence of eighteen months' hard labour, to run from the date of sentence.

Sentence reduced.

N. E. W.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACNAGHTEN.

MELBOURNE INMAN.

1929.
21 *October*,

Res judicata—Appeal *pro forma* to found application to the Attorney-General for his *fiat* of appeal.

Appeal against conviction.

Appellant was convicted at the County of London Sessions, on July 10, 1929, of keeping open and using premises, of which he was the occupier, for the purpose of unlawful gaming, contrary to section 4 of the Gaming Houses Act, 1854, and of keeping the same premises as a house for the purpose of betting with persons resorting thereto, contrary to section 3 of the Betting Act, 1853. He was sentenced by the Chairman to a fine of £5, and was ordered to pay the costs of the prosecution.

Sir Henry Maddocks, K.C. (*W. Frampton* with him), for the appellant:

The case is indistinguishable from KIRBY AND OTHERS, 20 Cr. App. R. 12, 1927, and it is not proposed to argue the present appeal. The object of the appeal is that the appellant, if so advised, may approach the Attorney-General for his certificate to enable the House of Lords to consider KIRBY and other relevant authorities. The Court is accordingly requested to dismiss this appeal without hearing argument.

H. D. Roome and *R. H. Blundell*, for the Crown.

The Court accordingly dismissed the appeal.

Appeal dismissed.

Solicitors—S. Myers & Son; Wontner & Sons.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ROWLATT.

1929.
28 *October.*

HAROLD WILLIAM PEARCY.

Previous Convictions—Long Intervals without Conviction.

Severity of sentence.

Application for leave to appeal against sentence and to call further evidence.

Applicant pleaded guilty to shopbreaking and larceny at West Sussex Quarter Sessions on October 10, 1929, and was sentenced by the Chairman to two years' imprisonment with hard labour.

No counsel appeared and applicant was not present.

The Court granted leave to appeal and dealt with the matter forthwith.

THE LORD CHIEF JUSTICE: The appellant is twenty-nine years of age, and has been previously convicted many times, but from 1922 to 1925 there was an interval of three years during which he was not convicted at all. In February, 1927, he was convicted of shopbreaking, and after his release in July, 1928, he worked at a colliery for four months, and was afterwards employed as a gardener, and then in road-making, and is said to have been a good and satisfactory workman. In a statement which he has sent to this Court he mentions the fact that he had "gone straight" for nearly a year, and also the material fact that he had been in custody for three months awaiting trial. In all the circumstances of the case the Court is of opinion that the sentence may properly be reduced to a sentence of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

MARK HOCHGLICK.

1929.
28 *October.*

MARK HOCHGLICK.

Hewart, L.C.J., Avory, J., Rowlatt, J.

Misdirection—Substantial Point Treated as a "Side Issue"—Weight of Evidence—Document not Forthcoming at the Trial Admitted.

If the Court is of opinion that at the close of the case for the prosecution there is no evidence to go to the jury it will (in the absence of evidence of such evidence from the defence) quash a conviction.

Appeal against conviction.

Appellant was convicted at the Central Criminal Court on July 25, 1929, of obtaining goods by false pretences, and was sentenced by the Recorder to twelve months' imprisonment in the second division.

P. Vos, for appellant, who was present, on bail:

Appellant was charged with having obtained goods by false pretences from several firms of silk merchants in Lyon. The charges in respect of one firm broke down after the cross-examination of the principal witness for the prosecution, and on these charges the Recorder held that there was no evidence to go to the jury, and the appellant was acquitted thereon. With regard to another firm, the allegation of the prosecution was that in February, 1929, the appellant went to Lyon and then placed with them a new contract, which was confirmed by a written invoice and the delivery of the goods. The appellant stated that the invoice in question related to an order placed months previously. Immediately after the trial a search was made among the documents in the possession of the appellant's trustee in bankruptcy, and a document dated October, 1928, was found. The leave of the Court is requested to call further evidence to show that that document refers to the same order as that comprised in the written invoice. The case against the appellant was opened by the prosecution on the basis that no trace could be found of any of the goods that were the subject of the charges. The evidence, however,

1929.
28 *October*.

MARK HOCHGLICK.

Hewart, L.C.J., Avory, J., Rowlatt, J.

showed that portions of them could be traced, but notwithstanding this, the Recorder, in his summing-up, dealt with the matter as if the prosecution had entirely substantiated their allegation. Further, the whole substance of the charge was that a balance sheet had been produced by the appellant to the various firms which delivered the goods to him which the appellant knew to be incorrect, but the prosecution entirely failed to prove this. In his summing-up the Recorder referred to this matter as a "side issue" and entirely omitted to direct the jury on the failure of the prosecution to prove what they alleged. [He was stopped.]

Cecil Whiteley, K.C. (*J. F. Eastwood* with him), for the Crown, did not seek to support the conviction.

THE LORD CHIEF JUSTICE: The false pretences alleged in the indictment were that the appellant falsely pretended that he was then carrying on an honest and genuine business as a silk merchant, that that business was in a prosperous condition, that he was then solvent, and that a balance sheet shown by him was genuine and truly represented his financial position. The sting of the allegation was in its tail, and the point of substance alleged against the appellant was that he had represented a balance sheet to be genuine when in fact it was false and false to his knowledge. As the case proceeded the contest came to turn upon a sum of roughly £4,000, which played a material part in the balance sheet. The appellant said that that sum represented sales omitted in error from his books, and the suggestion of the prosecution was, to use a colloquial expression, that that was all moonshine. If the entry of the £4,000 was false, and false to the knowledge of the appellant, the case against him might be said to have been made out, but, if that allegation of the prosecution failed, there remained very little substance in the case. During the course of the trial an accountant had an opportunity of going through books and documents with the appellant, and the result was that the accountant gave

1929.
28 *October*.

MARK HOCHGLICK

Hewart, L.C.J., Avory, J., Rowlatt, J.

further evidence that, subject to certain conditions, £3,300, at any rate, of that sum of £4,000 was satisfactorily explained. With regard to that large portion of the sum, therefore, the prosecution had not established their case. Nevertheless, when the case came to be summed up, the Recorder used words which not only indicated to the jury that this question about the £4,000 was a "side issue," but left it in doubt, to say the least, whether, notwithstanding the further evidence of the accountant, the original allegations of the prosecution were not correct. In the opinion of this Court that was not satisfactory. It might well have been said that, upon the evidence as it stood at its close, there was no case to go to the jury; but if there was, it was essential that the matter of the £4,000 should be treated not as a "side issue," but as a crucial issue, and the evidence relating to it fully and clearly explained. That course was not taken, and accordingly the conviction was unsatisfactory and cannot be supported. With regard to a large portion of the charge the case for the prosecution had entirely broken down and the appellant had been acquitted. The appeal is, accordingly, allowed and the conviction quashed.

Conviction quashed.

Solicitors for appellant: Cochrane & Carpwell.

T. R. F. B.

1929.
28 *October*.

REGINALD GODFREY CROCKETT.

REGINALD GODFREY CROCKETT.

Hewart, L.C.J., Avory, J., Rowlatt, J.

Date of Sentence Passed to run concurrently with a Previous Sentence still in Force.

Sentence cannot be ante-dated beyond the first day of the sessions in which it is inflicted.

Appeal against sentences, by leave of the Court.

Appellant pleaded guilty to sheep-stealing at Oxfordshire Sessions on July 2, 1929, and was sentenced by the Chairman to three years' penal servitude, the sentence to commence upon the termination of a *remanet* which appellant had to serve. He further pleaded guilty to sheep-stealing at Gloucester City Sessions on August 21, 1929, and was sentenced by the Recorder to three years' penal servitude, the sentence to date from and to run concurrently with the sentence passed at Oxfordshire Sessions.

Appellant in person.
No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: We think that the proper course is that the sentence of three years' penal servitude passed at the Oxfordshire Quarter Sessions should stand, but should date from the date of those sessions, and that the sentence passed at Gloucester City Sessions, which the Recorder had no power to ante-date, should be amended so as to be a sentence of three years' penal servitude commencing from the date of Gloucester City Sessions, and concurrent *pro tanto* with the sentence previously passed at the Oxfordshire Sessions. The result is that the total sentence to be served by the appellant will be somewhat longer, but, inasmuch as leave to appeal was given, the time during which the appellant has had special treatment as a prisoner who has given notice of appeal will count in his favour.

Sentences varied.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE TALBOT.

HENRY DEALER.

1929.
4 *November.*

Incorrigible Rogue—Begging—No Intimidation.

Severity of sentence.

Appeal against sentence by leave.

Appellant was convicted at petty sessions of being an incorrigible rogue, and was sentenced by the Chairman at Buckinghamshire Quarter Sessions on October 7, 1929, to twelve months' imprisonment with hard labour.

No counsel appeared, and appellant was not present.

THE LORD CHIEF JUSTICE: The offence of which the appellant was convicted was that of wandering abroad in a public place for the purpose of begging alms. The appellant is fifty-five years of age, and has been previously convicted no fewer than twenty-seven times. His longest previous sentence has been one of nine months' imprisonment with hard labour. He is described as an absolute nuisance to the community, but there was an interval from the end of 1926 till April, 1929, during which he was not convicted.

The practice of this Court has been to reduce sentences of this kind where nobody has been put in fear by the man who is begging. If there had been any intimidation or anything in the nature of blackmail in this case, the Court would not have interfered with the sentence. But as the case is one of mere begging and nobody has been put in fear, we think the proper course is to do in this case what has been done in other similar cases, and to reduce the sentence to one of three months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

1929.
6 *November.*

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

LAURENCE EDWARD HARDING.

Application Against Sentence Only—Leave Granted Against Conviction Also — Robbery — Possession — Ownership — Custody — Special Property.

To sustain an indictment for robbery the person robbed need not be owner of the chattel taken; custody or a special property is sufficient.

DEAKIN and SMITH, 2 East. P. C. 653: 1800, followed.

Appeal against conviction and sentence, by leave of the Court (on application against sentence only).

Appellant was convicted at Dorset Assizes, on October 22, 1929, of housebreaking, wounding with intent to disable, robbery when armed with an offensive weapon, and robbery with violence, and was sentenced by Charles, J., to twelve months' imprisonment with hard labour and to twelve strokes of the cat.

T. Cox Meech (under section 10 of the Criminal Appeal Act, 1907), for appellant, who was not present:

Appellant and another man, who were fugitives from a Borstal institution, broke into a house at Portland, Dorset. A servant, Miss Matthews, who was at the time the only person in the house, gave evidence that she was attacked by two men and struck on the head with a rolling-pin and that, when they demanded money and clothes, she handed over a mackintosh to one of them. This mackintosh was the property of her master, Commander Bowen, who was at the time in the garden. It is submitted that the conviction for robbery cannot stand. The indictment charged the prisoners for that they "did rob Valetta Mary Matthews of a mackintosh."

1929.
6 *November.*

LAURENCE EDWARD HARDING.

Hewart, L.C.J., Avory, J., Swift, J.

Miss Matthews was in no sense in possession of the mackintosh; it was not her property, nor was she a bailee, nor in the position of a person who had special custody of it. It is stated in Archbold, 27th ed., p. 55, that, to bring a case within the Larceny Act, 1916, "it must be proved upon the trial that the goods stolen are the absolute or special property of the person named in the indictment."

[THE LORD CHIEF JUSTICE: The question here is whether the servant can be said to have had custody of this mackintosh sufficient to satisfy the definition.]

The person who being present is put in fear by violence must be either the true owner of the goods or in possession of them as a bailee: FALLOWS and SEXTON: 1832, 5 C. & P. 508: 1832, and to THOMAS, 1 Leach Cr. Cas. 330: 1784. In J. J. ASHLEY, 1 Car. & Kir. 198: 1843, where plate was stolen in a club-house by a member of the club, it was held that an indictment laying the property in the plate in the steward of the club was bad. The plate was in fact delivered every night to an under-butler, who placed it in a chest in his pantry. In FALLOWS and SEXTON, 5 C. & P. 508: 1832, it was held that there could be no conviction for robbery where the thing stolen was not in the custody of the prosecutor, but there was a conviction for simple larceny. In THOMAS, 1 Leach Cr. Cas. 330: 1784, it was held that, on an indictment for assault with intent to rob, the assault must be made on the person intended to be robbed.

J. J. Llewellin, for the Crown:

The indictment was properly framed. In DEAKIN and SMITH, 2 East P. C. 653: 1800, goods were being conveyed from London to Spalding by a stage-coach, and the coach was held up by highwaymen, who seized them from the boot of the coach. The indictment laid the property in the goods in the driver (and not the owner) of the coach, and it was held that the conviction was right, as the driver had possession and a special property in goods committed to his charge. The present case is analogous. The servant, who was the only

1929.
6 *November.*

LAURENCE EDWARD HARDING.

Hewart, L.C.J., Avory, J., Swift, J.

person in the house, had a duty to keep her master's property intact and safe, as much as the driver of the coach in DEAKIN and SMITH and therefore had a special property in the mackintosh sufficient to satisfy the statute. [He was stopped.]

Cox Meech, in reply:

In DEAKIN and SMITH there was a special entrustment of the goods to the driver, which rendered him a bailee.

THE LORD CHIEF JUSTICE:[1] This appellant, Laurence Edward Harding, was convicted at the Dorset Assizes, together with another prisoner named Herbert Williams, upon an indictment which charged them with housebreaking with intent to steal, wounding with intent to disable, robbery when they were armed with an offensive weapon and robbery with violence. In the result the present appellant was sentenced to twelve months' imprisonment with hard labour and twelve strokes with the cat o'nine tails. The appellant applied in form for leave to appeal against sentence. In substance, however, his application also appeared to ask for leave to appeal against conviction, and the Court granted him leave so to appeal.

The real question in the case was a question of law, namely, whether upon the facts proved it was open to the jury to convict the appellant of robbery with violence. The case was that the appellant and Williams entered a house known as Ivybank at Portland, which was occupied by a Paymaster-Commander Bowen, and they entered it by opening a French window at about three o'clock in the afternoon of September 18 last. At that time the only person in the house was a domestic servant named Valetta Mary Matthews. She heard a noise and after finishing what she was doing upstairs she went down into the kitchen. There as she entered

(1) This judgment is a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

1929.
6 *November*.

LAURENCE EDWARD HARDING.

Hewart, L.C.J., Avory, J., Swift, J.

the door she saw two pairs of boots, and at that moment was struck across the forehead from behind the kitchen door with a rolling-pin. That rolling-pin was afterwards found to be bloodstained. It was a rolling-pin that was kept on a shelf just outside the kitchen door. The girl lost her spectacles and for a few seconds, according to her evidence, she saw nobody, but then she found that she was in the hands of both the appellant and Williams. She tried to get out by the back door but both the appellant and Williams kept her back. She then went to the larder and tried to scream, but one of the two, she believed the present appellant, put his hand over her mouth. Then both of the men tried to prevent her from getting to the larder, and they took her to the tap and tried to bathe her wound. They said they wanted money and clothes, and she gave one of them, she thought the appellant, her employer's mackintosh coat. Then she went upstairs, where she was followed by the appellant, and she called out to Commander Bowen, who was in the garden. One of the prisoners at that time was in the bathroom and the other in the Commander's bedroom. Commander Bowen came and afterwards it was found that the wound which had been inflicted upon the girl was a wound one and three-quarter inches long and it required five stitches. The girl was cross-examined and she said that she had seen no person in the kitchen before she was struck, she saw nobody for a few seconds after she was struck; there might have been time, she said, for some one to come into the kitchen between the striking of the blow and the time she came to herself. When she came to herself she said she was on her knees and both the prisoners were standing up and they pushed her back when she tried to get to the door. The prisoner Williams was seized upstairs. The appellant gave evidence on his own behalf. He said that, hearing someone come downstairs, Williams snatched something off a table, and went into the kitchen and he went into the scullery and closed the door. Then he heard somebody calling out from the kitchen, rushed

1929.
6 *November.*

LAURENCE EDWARD HARDING.

Hewart, L.C.J., Avory, J., Swift, J.

in and found Williams supporting the girl. He said to Williams: "We shall swing for this, you see"; the appellant said he went up and pulled open two or three drawers, pulled out a jacket, heard Williams call him, heard some people downstairs, and went into a bedroom and got under the bed. Those in outline were the facts of the case and the evidence offered, and the jury convicted the appellant, amongst other things, of robbery with violence.

When one looks at the counts charging robbery the expression which is used in both count 3 and count 4 is: "To rob Valetta Mary Matthews of a mackintosh," and it is important that in such a charge, as indeed in all charges, that what is alleged should be accurately pleaded.

Now robbery consists in the violent and forcible taking from the person of another or in his presence and against his will of any money or goods to any value by violence, or putting him in fear, and the question of law which arose in this case was whether it was true to say that Valetta Mary Matthews, being at this time the only person in the house, had a special property in this mackintosh so as to render it possible that by violence she could be robbed of it.

Counsel on behalf of the prosecution has directed the attention of the Court to a useful case in 2 East's Pleas of the Crown, at p. 653. The case is very short and as it is very important it may be well to read it. It is a case of the year 1800. The report says this: "James Deakin and William Smith were indicted for stealing spoons and other articles, laid in the second count (on which alone they were convicted) to be the property of one Markham. The goods had been sent by a tradesman in London to Mr. Broderick at Spalding by the Spalding coach and were stolen by the prisoners at Ponders End, out of the boot behind the coach. The question was, whether they were properly laid to be the property of Markham, who was not the owner but only the driver of the coach, there being no contract between him and the proprietors that he should be liable for anything stolen; and

1929.
6 *November.*

LAURENCE EDWARD HARDING.

Hewart, L.C.J., Avory, J., Swift, J.

it not appearing that he had been guilty of any laches. The case being referred to the Judges, it stood over for some time, but finally the conviction was holden right, the coachman having the possession and a special property in the goods committed to his charge."

Now, in view of the finding in that case, it appears to us that upon the facts of the present case it was correct to allege that these prisoners did rob the maid-servant Valetta Mary Matthews of the mackintosh. We have come to the conclusion, therefore, that this conviction was right and calls for no reconsideration.

With regard to the sentence a difficulty arises. It appears from the language which the learned Judge employed that he was under the impression that this sentence of twelve months' hard labour would wipe out the sentence of detention in a Borstal institution, which at that time the appellant, if he had not run away, would have been serving. The sentence of two years' detention in a Borstal institution had in fact been passed on June 25, 1929. That is to say, the sentence of Borstal detention would not expire until June, 1931, and, if this sentence remained as it is, the effect would be that, after the sentence of hard labour had been served, the appellant would have to return to a Borstal institution to complete his sentence there. For obvious reasons that is undesirable. It is also undesirable that that sentence should be remitted; a sentence of twelve months' imprisonment would be terminated before June, 1931, which is the ultimate date of the detention in the Borstal institution according to the sentence passed upon him previously. In those circumstances it appears to us that the best course is to revise this sentence in the following way: the sentence of twelve strokes with the cat o'nine tails will remain, but the sentence of imprisonment will be reduced to a sentence of three weeks' imprisonment, to commence from this day, and after that sentence has been served, and after the whipping

1929. 6 *November.*

LAURENCE EDWARD HARDING.

Hewart, L.C.J., Avory, J., Swift, J.

has been administered, the prisoner will return to Borstal to complete the sentence which he was there to serve.

Conviction affirmed; Sentence varied.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

1929. 11 *November,*

THOMAS GALLAGHER, *otherwise* HEMINGWAY.

Application for Leave to Appeal Against Sentence after Plea of Guilty —Leave to Appeal Against Conviction Granted—Indictment for Attempted Larceny—Attempt to Obtain by False Pretences Proved.

On an indictment for attempted larceny the Court has no power to substitute a conviction for an attempt to obtain by false pretences.

Appeal against conviction and sentence, by leave of the Court.

Appellant pleaded guilty at Bradford City Sessions, on October 10, 1929, to attempted larceny, and was sentenced by the Recorder to twenty months' imprisonment with hard labour.

Appellant in person.

J. S. Snowden, for the Crown:

It is conceded that the offences here were in reality those of attempting to obtain money by false pretences, and not in either case attempted larceny. The Court is asked, on the analogy of section 44 of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, to substitute a verdict in each case of guilty of attempting to obtain money by false pretences. There has been no substantial miscarriage of justice in this case.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty to an indictment containing two counts, which charged him

1929.
11 *November.*

THOMAS GALLAGHER *otherwise* HEMINGWAY.

Hewart, L.C.J., Avory, J., Swift, J.

with attempting to steal on August 6 a sum of 5½d. and, on the same day, another sum of 11d. belonging to the same person. He applied originally for leave to appeal against sentence only, but the Court thought it right to grant him leave to appeal against conviction also.

The case was that the appellant went into a shop in Bradford and asked an assistant for a box of matches, tendering her a shilling. The assistant handed him a box and change consisting of a sixpence and five pennies. The appellant then said to the assistant: "You have given me a halfpenny instead of a sixpence," and held out his left hand, which contained five pennies and a halfpenny. The assistant had given the change into his right hand. She looked to see whether a sixpence had been left on the counter, but the appellant said that it did not matter and went out of the shop. A little later he came back into the shop and bought a newspaper, of which the price was twopence, handing the manager a half-crown. He received in change two separate shillings and four pennies, and again complained that he had received wrong change, showing one shilling and five pennies in his hand.

It is quite obvious that these charges of attempted larceny were misconceived. The charges ought to have been charges of attempting to obtain money by false pretences. It has been suggested to this Court that, as upon an indictment for larceny, there may, in a proper case, be a conviction for false pretences, the same consideration ought to apply where the charge is not larceny but attempted larceny, and that we ought to substitute for the present conviction a conviction of attempting to obtain money by false pretences. The statute, however, does not deal with attempts, and this Court is not in the position of those who have statutory powers to modify the provisions of statutes. We have to administer the law as it stands. The appellant has been convicted of an offence which he did not commit, and there is only one course open

1929.
11 *November*.

THOMAS GALLAGHER *otherwise* HEMINGWAY.

Hewart, L.C.J., Avory, J., Swift, J.

to us, and that is to allow the appeal, and to quash the conviction.

Conviction quashed.

T. R. F. B.

1929.
11 *November*.

JOHN WILLIAM CANHAM, CHARLES CUSHING.

Severity of sentence after previous convictions.

JOHN WILLIAM CANHAM, CHARLES CUSHING.

Hewart, L.C.J., Avory, J., Swift, J.

Appeals against sentences by leave.

Appellants pleaded guilty at Norwich City Sessions, on October 14, 1929, to shopbreaking and larceny and warehouse-breaking and larceny respectively, and were each sentenced by the Recorder to five years' penal servitude.

Appellants in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant Canham is twenty-six years of age, and after three earlier convictions, one for larceny and two for knowingly receiving stolen property, was in October, 1926, sentenced to three years penal servitude for one case of housebreaking and two cases of shop-breaking, a series of other offences being taken into consideration. He was liberated on August 30, 1929, and work was found for him by the police, and he was in fact on licence when he committed this offence.

The appellant Cushing is fifty-seven years of age. He has been sentenced to three months' hard labour for assault, three months' for malicious damage and twelve months' for ware-housebreaking. He was released in March, 1928, and there has been nothing against him since that time.

It is clear, in the opinion of this Court, that these sentences should be reconsidered. In the case of Canham we substitute a sentence of four years' penal servitude, and in the case of

Cushing a sentence of eighteen months' imprisonment with hard labour, the sentences to run in each case from the date of conviction.

1929.
11 *November.*

JOHN WILLIAM CANHAM, CHARLES CUSHING.

Hewart, L.C.J., Avory, J., Swift, J.

Sentences reduced.

T. R. F. B.

GEORGE FREDERICK GORE.

Severity of sentence.

1929.
11 *November.*

GEORGE FREDERICK GORE.

Hewart, L.C.J., Avory, J., Swift, J.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at petty sessions to larceny, and was committed to Gloucestershire Quarter Sessions for sentence. On October 16, 1929, he was sentenced by the Chairman to three years' detention in a Borstal Institution.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant states that he has been in prison since July 26 for shooting out of a gun, which he did not steal, and which he did not know was stolen. This Court cannot inquire into the conviction, being concerned with the question of sentence only in this case, but, looking at all the circumstances of the case, we think that the sentence should be revised, and we order that the appellant be bound over in his own recognisances in the sum of £5 to come up for judgment if called upon.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

WILLIAM MARK LINES.

1929.
2 *December.*

Shooting with Intent to do Grievous Bodily Harm—Provocation—Youth of Prisoner—Penal Servitude—Borstal Institution.

Sentence varied in view of information not before the court of trial.

1929.
2 *December.*

WILLIAM MARK LINES.

Hewart, L.C.J., Avory, J., Talbot, J.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at Northampton Assizes on October 22, 1929, to shooting with intent to do grievous bodily harm, and was sentenced by MacKinnon, J., to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant is a month or two under the age of eighteen, and at the time of the offence he was a recruit in the Northamptonshire Regiment. In charge of the room occupied by the appellant at Northampton Barracks was a lance-corporal named Johnson. It is quite clear that, under some provocation, the appellant took a rifle and fired at Johnson. It is also clear that, in view of the age of the appellant and the circumstances of the case, the judge at the trial would have passed a sentence of detention in a Borstal institution if he had had the information that is now before this Court. We have a report from the Governor and the Medical Officer of the Boys' Prison at Wandsworth; they have formed the clear opinion that this is a suitable case for Borstal training, and we think it right to alter the sentence to one of three years' detention in a Borstal institution, to commence from the date of conviction.

Sentence varied.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

1929.
9 *December.*

JAMES DUNNE.

Infant—Voir Dire—*Examination Out of Court.*

The examination by the Judge out of court of a child to determine competency to take an oath is illegal and sufficient to invalidate a conviction.

1929.
9 *December.*

JAMES DUNNE.

Hewart, L.C.J., Avory, J., Talbot, J.

Appeal against conviction, by leave of the Court.

Appellant was convicted of incest with his granddaughter, aged seven, at Warwick Assizes on November 14, 1929, and was sentenced by MacKinnon, J., to three years' penal servitude.

Douglas Jenkins, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not present:

There are a number of objections to this conviction. In the first place, the prosecutrix, who was a child aged seven years, was taken out of court and questioned by the judge before being sworn. This was entirely irregular and especially harmful here because there was no corroboration of this sworn evidence. [AVORY, J.: If there is no corroboration and the child is not sworn, the judge ought to stop the case.] It is conceivable, too, that a child's answers may be so "pat" as to show that he or she has been "coached" about which I could cross-examine [He was stopped.]

G. P. Glanfield, for the Crown:

The judge's object in taking the child out of court was to ascertain whether she understood the nature of an oath; when he returned he ordered her to be sworn. That was a matter which did not concern the jury and was for the Judge only. [THE LORD CHIEF JUSTICE: Were not the answers given by her to the preliminary questions relevant on the question whether the jury ought to believe her story?] There was no miscarriage of justice, inasmuch as the child had been sworn in the court below without any protest from the prisoner's adviser. Even if her evidence be treated as that of an unsworn witness there was corroboration in the admission by the prisoner that he had been with the child in a confined space a very short time before she was found to have been violated.

THE LORD CHIEF JUSTICE: When the case for the prosecution had been opened, a little girl seven years old was called,

1929.
9 *December*.

JAMES DUNNE.

Hewart, L.C.J., Avory, J., Talbot, J.

and thereupon the transcript of the shorthand note of the trial proceeds: "Mr. Glanfield: Does your Lordship think this witness should be sworn? MacKinnon, J.: Bring her round to my room. His Lordship and the witness retired and after a short time returned into court. MacKinnon, J.: She can be sworn. The witness was sworn." It goes without saying that what the Judge did in that matter was suggested purely by feelings of kindness and consideration for the youthful witness. The question for this Court is, can a conviction stand after an incident of that kind has occurred? It is admittedly an incident without parallel. Admittedly, nobody in this Court, either from his own experience or from researches into the authorities, can adduce any parallel case. In the result, something was said to or by this witness which was not in the hearing or presence of the jury or of the accused. The Court is clearly of opinion that, in these circumstances, the appeal must be allowed and the conviction quashed.

Conviction quashed.

T. R. F. B.

1929.
9 *December*.

MAURICE CAMERON ANDERSON.

Hewart, L.C.J., Avory, J., Talbot, J.

MAURICE CAMERON ANDERSON.

Cross-Examination—Document Mentioned to Jury but not Produced—Jury Ordered to Retire from Court Pending Statements Made—Defence Objecting—Judge in Effect Stating Belief in Accused's Guilt—Larceny—Animus Furandi—*Summing Up.*

Counsel must not convey to the jury by suggestion or otherwise that there is in existence a document prejudicial to the defence, unless he is in a position to produce that document in due course of law; such a communication is sufficient to invalidate a conviction.

The Judge is not entitled to order the jury to withdraw in order to hear statements in their absence without the consent of the defence.

The Judge ought not to refer to the case on trial in terms which

express his belief in the guilt of the accused. Such a remark is sufficient to invalidate a conviction.

On a trial for larceny there must be a direction on intent.

1929.
9 *December*.

MAURICE CAMERON ANDERSON.

Hewart, L.C.J., Avory, J., Talbot, J.

Appeal against conviction.

Appellant was convicted at the County of London Sessions on November 7, 1929, before the Deputy-Chairman, of larceny. Sentence was postponed until the following Sessions, when appellant was bound over for two years.

Sir H. Curtis-Bennett, K.C. (*G. D. Roberts* with him), for appellant:

Appellant was a practising medical man. In September, 1929, he took a room at 100 Cambridge Street, Pimlico, in the assumed name of Major Bruce, for a week, and he wrote a number of letters to the landlady in that name explaining why he was not taking up residence. At the same time he wrote to a number of foreign stamp dealers in the name of Major Bruce, asking them to send stamps on approval, or in some cases applying for free gifts that had been advertised. On September 28, 1929, appellant was in the neighbourhood of Cambridge Street, Pimlico; he spoke to three little boys, who took an attaché case to 100 Cambridge Street and fetched a large quantity of letters containing stamps on approval that was awaiting him there. He was arrested as soon as the case was handed to him. There was evidence that appellant had prepared a number of documents in regard to the return of stamps to the stamp dealers. The facts were not in dispute, and the sole question for the jury was whether at the time appellant took possession of the stamps he intended to deal with them honestly. At the trial appellant's character was put in issue and appellant was cross-examined whether he had not signed a statement, upon dissolving partnership with another doctor, in which he admitted dishonesty. Appellant denied that he had ever made such an admission. The question should not have been put without producing the document referred to. There was no such document in court. Counsel for

1929.
9 *December*.

MAURICE CAMERON ANDERSON.

Hewart, L.C.J., Avory, J., Talbot, J.

the prosecution held in his hand a document when cross-examining, and the jury must have seen this. They must, therefore, have formed the impression that the document referred to was in existence. Counsel for the prosecution had stated that the document could not be produced at that moment. It is submitted that the above cross-examination, without the production of the document, was entirely irregular; he cited S. YOUSRY, 84 L. J. K. B. 1272; 31 T. L. R. 27; 112 L. T. 311; 11 Cr. App. R. 13: 1914. [TALBOT, J.: Did not this amount to an attempt to give oral evidence of the contents of a written document?] Further, the jury retired at the request of counsel for the prosecution, and a discussion in regard to the document took place in their absence. This retirement was strenuously objected to by the defence, and it must have had a most dangerous effect on their judgment on the rest of the case. The summing-up was unsatisfactory, in that there was no proper direction on the question of burden of proof and no reference to the essential ingredient of intent.

J. F. Eastwood, for the Crown:

It is submitted that the cross-examination referred to was within the permissible limits. It was expected at the time that the original of the alleged statement would be brought into court at any moment. If the court takes a contrary view in regard to the propriety of the cross-examination, no attempt will be made to defend it here. With regard to the departure of the jury from court, the prosecution took the view that the discussion would necessitate the mention of a number of matters which could not have been given in evidence and which would have affected the minds of the jury in a manner adverse to the accused. The summing-up was not altogether satisfactory, but in one passage the principle of the burden of proof was made clear.

THE LORD CHIEF JUSTICE: It is a little important to remember that there was no dispute on the facts of this case.

1929.
9 *December.*

MAURICE CAMERON ANDERSON.

Hewart, L.C.J., Avory, J., Talbot, J,

There are three main grounds on which the conviction is criticised. In the first place, it is said that, in the cross-examination of the appellant, counsel for the prosecution asked a series of questions tending to show or to suggest to the jury that the appellant had previously, on dissolving partnership with another doctor, signed a statement in which he admitted dishonesty. Those questions were put again and again. Nevertheless no such statement was in court, and whatever copies of documents there may have been, the original of that alleged statement was never produced. Still, it appears that at some point of the cross-examination a document was made visible to the jury and questions were put which might easily have conveyed to their minds that, whatever the witness might say or deny, there was in court an original document to the effect alleged, bearing his signature. It is admitted that there was no such original, nor could any such document have been produced in court.

It is an elementary rule that the contents of a written document, if they are to be proved, should be proved by production of the document and not by oral testimony. In Roscoe's *Evidence in Civil Actions* (19th ed.), p. 160, it is stated: "In consequence of the general rule that the contents of a written document ought to be proved by the production of it, and not by oral testimony, it was held in THE QUEEN'S CASE, 2 Br. & B. 287 [22 R. R. 662: 1820] that it was not competent to ask a witness, even on cross-examination, about a statement formerly made by him in writing without showing to him the writing referred to, and putting it in evidence as part of the case of the cross-examining party either immediately or in the ordinary course of the cause; and this opinion of the judges has been since constantly acted upon, whether the question be put merely to discredit the witness by contradicting him, or as conducive to proof of the matter in issue"; and reference is made to the case of MACDONNELL *v.* EVANS, 11 C. B. 930; 21 L. J. C. P. 141: 1852. It is quite true that when one looks at section 5

1929.
9 *December*.

MAURICE CAMERON ANDERSON.

Hewart, L.C.J., Avory, J., Talbot, J.

of the Criminal Procedure Act, 28 & 29 Vict. c. 18, one there finds this provision: "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him, but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection. . . ."

"Without such writing being shown to him," the Act says, *not* "without such writing being capable of being produced," and still less may anything be done which is likely to suggest to the jury that the writing is capable of being produced if it is not. Here it would seem, both from what was said and what was done, that it might well appear to the jury that there was in existence a producible original document in which, over his signature, the appellant had admitted dishonesty, when in fact no such document could be produced and when the appellant denied that his admissions, whatever they had been, included an admission of dishonesty. That state of affairs, on being established, would be sufficient to make it necessary to quash this conviction.

The matter, however, by no means ends there. After a controversy had arisen in regard to this document, it was suggested that the jury should leave the box and that matters relating to this document should be discussed in their absence. That suggestion was not made on the part of the defence; on the contrary it was strongly and repeatedly objected to on the part of the defence. Nevertheless, the jury were requested to leave, and did leave, the box, and various statements were made in their absence. In other words, the matter was enveloped with an air of mystery and suspicion, from which it was at any rate possible that the jury might draw the

1929.
9 *December.*

MAURICE CAMERON ANDERSON.

Hewart, L.C.J., Avory, J., Talbot, J.

inference that they had been asked to leave the court because circumstances of a character damaging to the accused were to be discussed. It is difficult to imagine any circumstances in which, except at the request or with the consent of the defence, a jury can possibly be asked to leave the box in order that statements may be made during their absence.

Finally, in the summing-up, not only was there no direction on the burden of proof, but there was, unfortunately, an omission to direct the jury on the very essence of the matter, namely, whether, upon the admitted facts, the intention of the accused was a criminal intention. It has been said that, in one passage at any rate, that question was made sufficiently plain to the jury, but that passage, when examined, is an unfortunate one. It reads: "In the case where the person to whom the goods were sent has pretended to be somebody else, the view of the court is that there is no agreement for sale on approval or delivery on approval at all, because the person to whom they are sent is not the person to whom the owner thought he was sending the goods. If the person gets the goods by that trick, never intending to return them, in the opinion of these learned judges that is larceny, and that is this case." To say "that is this case" is to say that the appellant never intended to return these stamps; in other words, the summing-up purports to decide against the accused on the very kernel of this defence. Further, it omitted to notice the possible alternative that the accused might have kept the stamps, intending to pay for them.

On all these grounds, jointly and severally, it appears to us that this conviction cannot stand. The appeal is, therefore, allowed and the conviction quashed.

Conviction quashed.

T. R. F. B.

Solicitors for appellant: Philip Conway, Thomas & Co.; *Solicitors* for the Crown: Wontner & Sons.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

1929.
16 *December.*

EDWARD VANNIASCHERAM CHARAVANMUTTU.

Bail—Vacation—Circumstances of the Case.

In considering applications for bail the Court has regard to the interval of a vacation.

Application for bail.

Applicant was convicted at York Assizes on November 26, 1929, of indecent assault and gross indecency with male persons, and was sentenced by Hawke, J., to twelve months' imprisonment in the second division.

H. Elam, for the applicant, who was not present:

Bail is sought because, owing to the Christmas vacation, the appeal cannot be heard before the middle of January. The applicant's legal advisers are in London, and he will not have facilities for seeing them if he is not admitted to bail. There are substantial grounds for the appeal, the principal one being lack of corroboration. Applicant has always borne a very good character. The prosecution offers no objection to bail.

No counsel appeared for the Crown.

TALBOT, J.: In the circumstances of this case the Court will admit the appellant to bail upon his recognisances in the sum of £200 and those of two sureties in that of £100 each.

Application granted.

Solicitor for applicant: H. S. L. Polak.

T. R. F. B.

PERCY BROWN.

1929.
16 *December.*

PERCY BROWN.

Hewart, L.C.J., Avory, J., Talbot, J.

Procuration — "False Pretences" or "Representations" — Statutory Corroboration—Previous Good Character—Second Division.

A letter to a woman in fact procured, alluding to the writer as her future husband, is corroboration of evidence that he procured her by "false pretences," etc., within section 3 of 48 & 49 Vict. c. 69, the Criminal Law Amendment Act, 1885.

Appeal against conviction, by leave of the Court.

Appellant was convicted at Glamorganshire Assizes on November 19, 1929, of procuration, and was sentenced by Wright, J., to four months' imprisonment.

W. A. Prichard, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present: There was not here corroboration, implicating the accused in the offence of procuring, sufficient to satisfy the proviso of section 3 of 48 & 49 Vict. c. 69, the Criminal Law Amendment Act, 1885. The words are: "Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused." There must be corroboration of the procuration —not only of the seduction.

[TALBOT, J.: The words "By false pretences or false representations" in sub-section 2 mean or cover seduction through false pretences.]

O. Temple Morris, for the Crown, was not called upon.

THE LORD CHIEF JUSTICE: In this case the fact of carnal connection having taken place was established, and also the fact that the appellant was a married man. The evidence was that before having connection he had represented to the woman that he was unmarried. In one letter to her he signed himself "Your hubby." The question was whether there had been a false representation made for the purpose of pro-

1929.
16 *December.*

PERCY BROWN.

Hewart, L.C.J., Avory, J., Talbot, J.

curing, and in fact procuring, the woman to have connection with him. It seems to this Court that the evidence was capable of being so regarded, and that notwithstanding some unsatisfactory features in the evidence, there was evidence which entitled the jury to convict. We have, therefore, come to the conclusion that this conviction ought to stand, but that, as the appellant is in other respects a man of good character, the imprisonment should be served in the second division. The sentence will run from the date of conviction.

Conviction affirmed; sentence varied.

T. R. F. B.

WILLIAM GREENWOOD.

1929.
16 *December.*

WILLIAM GREENWOOD.

Hewart, L.C.J., Avory, J., Talbot, J.

Sentence reduced in view of youth and previous good character.

Appeal against sentence, by leave of the Court.

Appellant was convicted at Glamorganshire Assizes on November 15, 1929, of rape and of sodomy with the same woman, and was sentenced by Wright, J., to two concurrent terms of seven years' penal servitude.

Ifor Lloyd, for appellant, who was present:

Appellant was aged twenty at the time of the commission of the offence and had previously borne an excellent character.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: We have carefully considered this case and we have come to the conclusion, by no means without hesitation, that in view of the youth of the appellant and in view of his previous excellent character, the sentences may be reduced to five years' penal servitude.

Sentences reduced.

Solicitors for appellant: Barnett Janner & Co.

T. R. F. B.

INDEX.

ACQUITTAL. *See* CONVICTION QUASHED.

ADJOURNMENT. *See also* PERJURY.
sine die, 57

ADMISSIONS
by alleged habitual criminal, 121

ALIBI,
defence of, not *ex improviso*, 3
ought to be set up at earliest possible moment, 27

AMENDMENT
of indictment, 85

AMICUS CURIÆ, 56

ANIMUS FURANDI
must be put to jury, 179

APPEAL
after plea of guilty, 172
against order to pay "compensation," etc., lies, 59
and application heard same day, 143
pro forma, 159

APPELLANT OR APPLICANT INSANE, 57

APPLICATION. *See also* SENTENCES.
against conviction treated as against sentence, 74
vice versa, 166, 173

ARREST OF JUDGMENT, 21

"ASSOCIATE OF THIEVES,"
allegation of being, must be notified, 25

ATTEMPTED LARCENY
cannot be found for attempt to obtain, etc., 172

AUTREFOIS ACQUIT
not a good plea after trial held to be a nullity, 144

BAIL,
granted by Court, 26, 125, 184
threat not to grant, may be improper, 151

BANKRUPTCY,
"preliminary" examination in, 85

BEGGING
without intimidation, 165

BORSTAL TREATMENT,
remarks on, 16

CARNAL KNOWLEDGE, ETC.,
defence in, 125. *See* INDECENT ASSAULT.

CERTIFICATE,
appeals on, 125, 132

CO-DEFENDANTS OR CO-PRISONERS,
sentences on, different, 38
summing-up must distinguish respective cases against, 33

COMMON DESIGN, 94
direction on, 79

"COMMON GAMING HOUSE,"
what is, 119

COMMUNICATION BETWEEN CONSPIRERS, 94

"COMPENSATION," ETC.,
to "person aggrieved." *See* SENTENCE.

"COMPULSORY" PROCESS.
what is, 85

CONFESSION,
when protected, 85. *See* VOLUNTARY STATEMENT.

CONSECUTIVE SENTENCES, 140

CONSPIRACY,
ingredients of, 94

CONVICTION QUASHED,
not necessarily an acquittal, 144
running from date of trial, exceptionally, 105

CONVICTIONS QUASHED, 13, 19, 25, 26, 31, 35, 64, 65, 66, 71, 73, 76, 79, 81, 119, 148, 150, 152, 163, 174, 178, 183
as habitual criminal, 23, 26, 45, 71, 73, 108
on the ground of,
alibi not disproved, 13
proved, 30
bill not properly found, 116
child examined out of court, 178
common design not proved, 79
document not producible mentioned to jury, 178
duplication of counts, 78
evidence insufficient (f. pr.), 19, 45; cf. 66, 76, 161
misreceived (as corroboration of receiving), 35, 149
fresh evidence (breaking in), 27; cf. 161
indictment misconceived, 172
interval(s) of work (habitual criminal), 23, 107—8
judge, leaving case to jury, 66
opinion of, 76, 178—9
jury absent, when statements made, 178
misconception of offence, 172
(breaking), 64, 113
misdirection (carnal knowledge), 25
(common design), 81
(drunken motorist), 36

CONVICTIONS QUASHED—*continued.*
on the ground of—*continued.*
misdirection (fraudulent intent), 65
(incest), 148
(larceny), 178—9
(obtaining, etc.), 161
(*onus*), 13, 113
mistake about evidence, 64
no case to go to jury, 161
no corroboration, 151
notice to habitual criminal insufficient, 25
onus not explained, 36, 113, 178—9
verdict against weight of evidence. *See* evidence *above.*

CORROBORATION,
is answer by uncautioned prisoner? 33
of female (incest), 147
of procuration, 185
silence is not, 23

COUNSEL,
defending capital case, language of, 17
desirable for defence (of rape), 151
must not suggest contents of unproducible document, 178
withdrawing, 56

COUNT NOT TRIED,
procedure on, 83

CRIMINAL LAW AMENDMENT ACT, 1922,
observations by the Court on, 45, 130, 134

CUSTODY IN INDICTMENT, 166

DEFENCE,
of *alibi*, not set up below, 3
of capital cases. *See* COUNSEL.
reserving, prejudicial to defendant, 27

DELAY IN APPEAL,
ground of sentence running from trial, 105

DOCUMENT NOT PRODUCIBLE,
not to be suggested to jury, 178

ENQUIRIES ORDERED BY COURT, 14, 27

EVIDENCE. *See* STATEMENT; WITNESS.
circumstantial, value of, 21
inadmissible, suggested to jury, 178
of confession not protected, 85

EX IMPROVISO. *See* ALIBI.

EXPERTS,
report of, to Court, 15—16

EXTENSION OF TIME
allowed, 113; cf. 114
refused, 31

FALSE PRETENCES,
attempted [*See*]
falsity, in, must be strictly proved, 18, 44
procuration by, 185
value must be considered in sentence for, 47

FIRST CONVICTION,
on, as a rule, imprisonment *only*, 43

FRESH EVIDENCE
allowed, 27
by police, Court is reluctant to hear, 1

GRAND JURY,
altering bill preferred, 116

GUILTY, PLEA OF,
Court will not interfere on, 81
except on ground of illegality, 172

HABITUAL CRIMINAL,
admissions on trial of allegation as, good, 121—2
allegation of being, in indictment as previous conviction, 40
four times found, 39
onus, on trial of, 72
plea of guilty of being, to be explained to accused, 70
proof of being, 21
notice of, 25

HONEST WORK,
interval of, must be directed on, 21
every, 106
sentence reduced in view of, 44, 58, 109, 110, 160

"IMMEDIATELY . . . AFTER CONVICTION,"
meaning of, 59

INCEST,
female accomplice in, direction on, 147

INDECENT ASSAULT,
defence in, Court's view of, 45, 125. Cf. CARNAL KNOWLEDGE.

INDICTMENT,
amendment of, 85
by grand jury, 116
joint. [*See*]
possession in, 166

INFANT,
oath of. [*See*]

INTENT IN LARCENY. *See* ANIMUS.

INTENTION TO COMMIT AN OFFENCE,
how to be indicted, 41

JOINT INDICTMENT,
defences in, 112
sentences on, 111, 141, 155

JUDGE
must not state belief in guilt, 178

JURY
disagreeing, procedure on, 149
improperly made to withdraw, 178

LONG VACATION. *See* BAIL.

MANSLAUGHTER,
defence of, must be put to the jury, 48

MULTIPLYING CHARGES,
Court discourages, 78

NULLITY. *See AUTREFOIS ACQUIT.*

OATH OF CHILD. *See VOIR DIRE.*

OBTAINING, ETC., ATTEMPTED. *See* ATTEMPTED LARCENY.

OFFENCE
in same words in different sections, 89—90

ONUS. See under CONVICTIONS QUASHED; SENTENCES REDUCED.
must be directed on, 35

ORAL ORDER,
recorded later, good, 59

ORDER ON CONVICTED PERSON TO PAY,
appeal against, lies, 59

OTHER OFFENCES
not taken into account. *See* SCOTS.

PENAL SERVITUDE
not for attempted housebreaking, 107
necessarily inflicted after one term, 42

PERJURY
suspected by judge, not a ground for adjournment, 33

POLICE EVIDENCE.
after conviction inaccurate, 37
of suspicion, Court hears reluctantly, 1

POSSESSION IN INDICTMENT, 166

"PRELIMINARY" EXAMINATION. *See* BANKRUPTCY.

PREVIOUS CONVICTION
of being a habitual criminal when necessary allegation? 40

PRISONER,
no right of, to make statement after conviction, 21
on appeal, if represented, 56

PROCURATION. *See* FALSE PRETENCES.

PROPERTY, "SPECIAL,"
in robbery, 166

PROVOCATION,
for the jury, 54

RAPE. *See under* COUNSEL.

REBUTTING EVIDENCE,
adjournment for. *See* PERJURY.

REMANET
to be taken into account in sentence, 156

RESTITUTION AFFECTING SENTENCE, 152

ROBBERY,
possession in, 166

SCOTS COURT
declines to consider offences in England, 31

SECTION REPEALED AND RE-ENACTED,
use of, 85

"SENTENCE"
in section 21 of Criminal Appeal Act, meaning of, 59

SENTENCES,
application to reduce, treated as final appeal, 41
against conviction, 166, 173
cannot be antedated, 164
on fiduciary persons, 92—3
postoned or delayed, run from earlier date, 69, 105
principles of review of, 16, 19, 32

SENTENCES REDUCED, 3, 16, 23, 37, 42, 44, 46, 47, 55, 58, 67, 68, 69, 72, 78, 79, 93, 108, 110, 111, 112, 114, 115, 132, 136, 137, 140, 142, 143, 146, 153, 154, 155, 156, 157, 158, 160, 165, 175, 186
(attempted housebreaking), 108
(attempted suicide), 140
(bigamy), 68
(breaking, etc.), 42, 44, 67, 79, 109, 115, 138, 142, 143, 155, 158, 160, 175
(burglary), 39
(carnal knowledge), 72
(false pretences), 47, 58, 137
(fraudulent conversion), 93
(habitual criminal, primary), 23
("incorrigible rogue"), 165
(indecency), 154
(indecent assault), 46, 132, 146
(larceny), 37, 78, 109, 110, 111, 112, 115, 138, 175
(murder), 55
(rape, etc.), 186
(receiving), 3, 153
(threatening murder), 136
(trustee's fraud), 93
(wounding with intent), 16
on the ground of—
age, 154
co-prisoner's term, 38, 67, 111
court below not knowing its power, 75

SENTENCES REDUCED—*continued.*
on the ground of—*continued.*
disproportion to offence, 137, 138
duplication of charges, 79
first conviction, 1, 93, 136, 186
fresh evidence, 68
information, 176
greater severity than on previous hearing, 146
honest work [*See*]
illegality (attempt), 107
(obtaining credit), 114
mental condition, 16
no discrimination between defendants, 67
not running from first sitting of court, 69, 164
police evidence wrong, 87
remanet, 156
youth, 72, 115, 138, 142, 155, 158, 176, 186

SENTENCES VARIED,
Borstal institution to recognisance, 175
death to penal servitude, 55
hard labour to imprisonment, 143
imprisonment to Borstal, 171-2
fine, costs, etc., 75
recognisances, 115
second division, 106, 186
penal servitude to Borstal, 16, 141, 176
to avoid antedating, 164

SILENCE. *See* CORROBORATION.

"SPECIAL" PROPERTY IN ROBBERY, 166

STATEMENT
by prisoner after conviction, 21
of third person not to be inferred from another's act, 23

SUNDAY
not a *dies non*, 108

TRUE BILL,
form of, 116

VACATION INTERVAL,
ground for bail, 184

VOIR DIRE,
examination on, must be in court, 176

VOLUNTARY STATEMENT,
no part of, excluded, 139

"WHIST DRIVE,"
legality of, 119

"WITHOUT SUCH WRITING BEING SHOWN,"
interpreted, 182

WITNESS
cannot corroborate himself, 23

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